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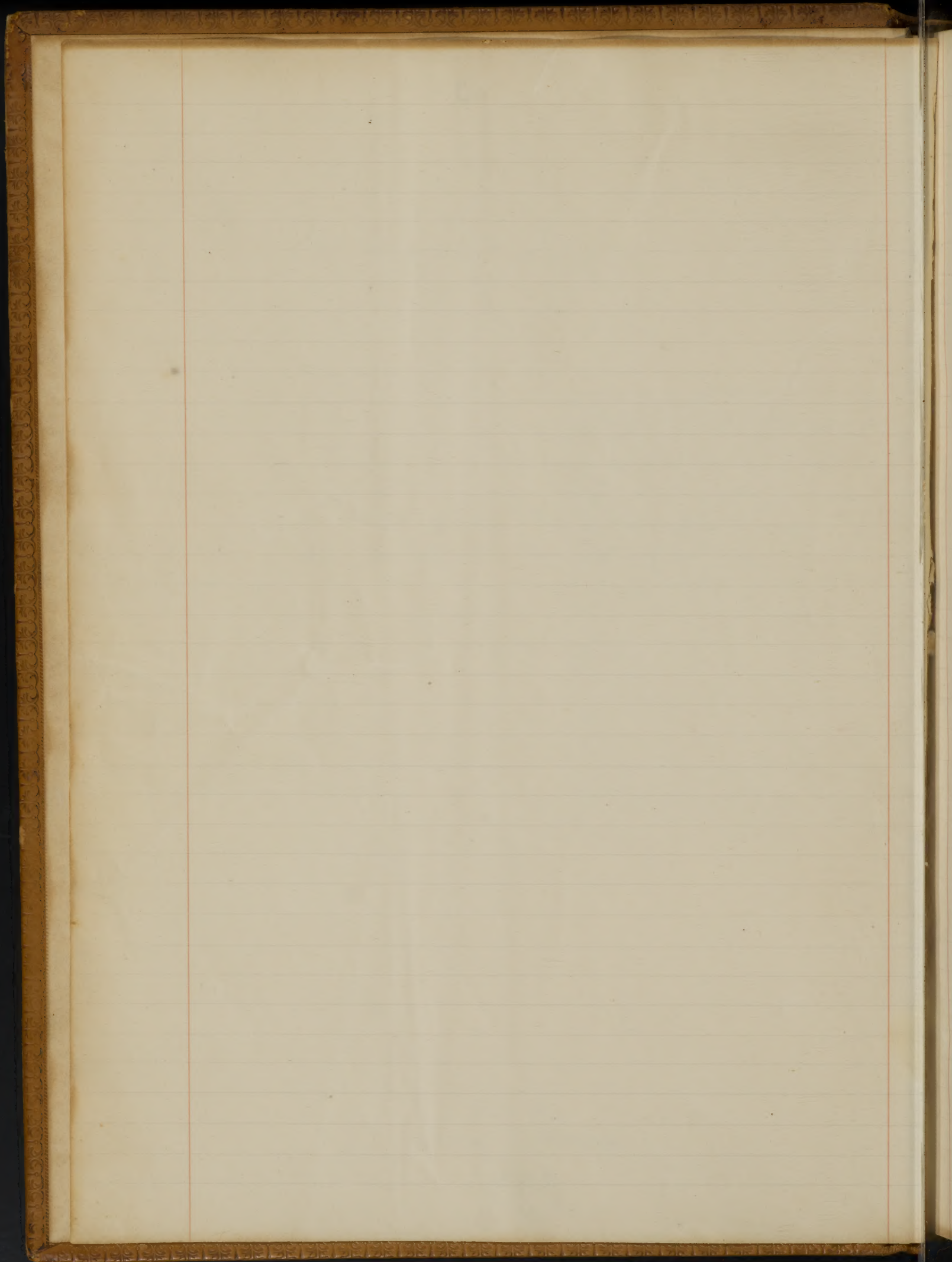
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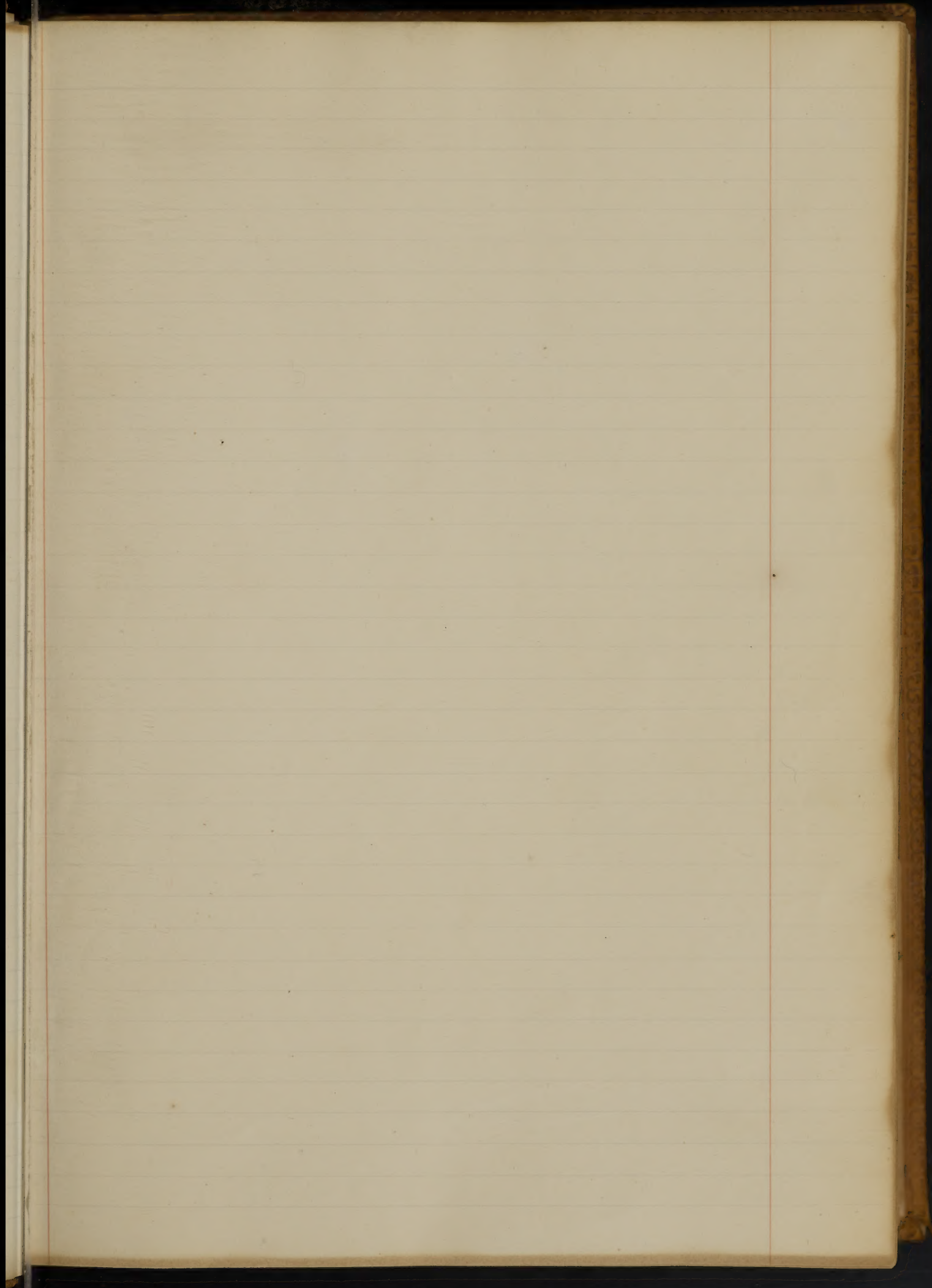


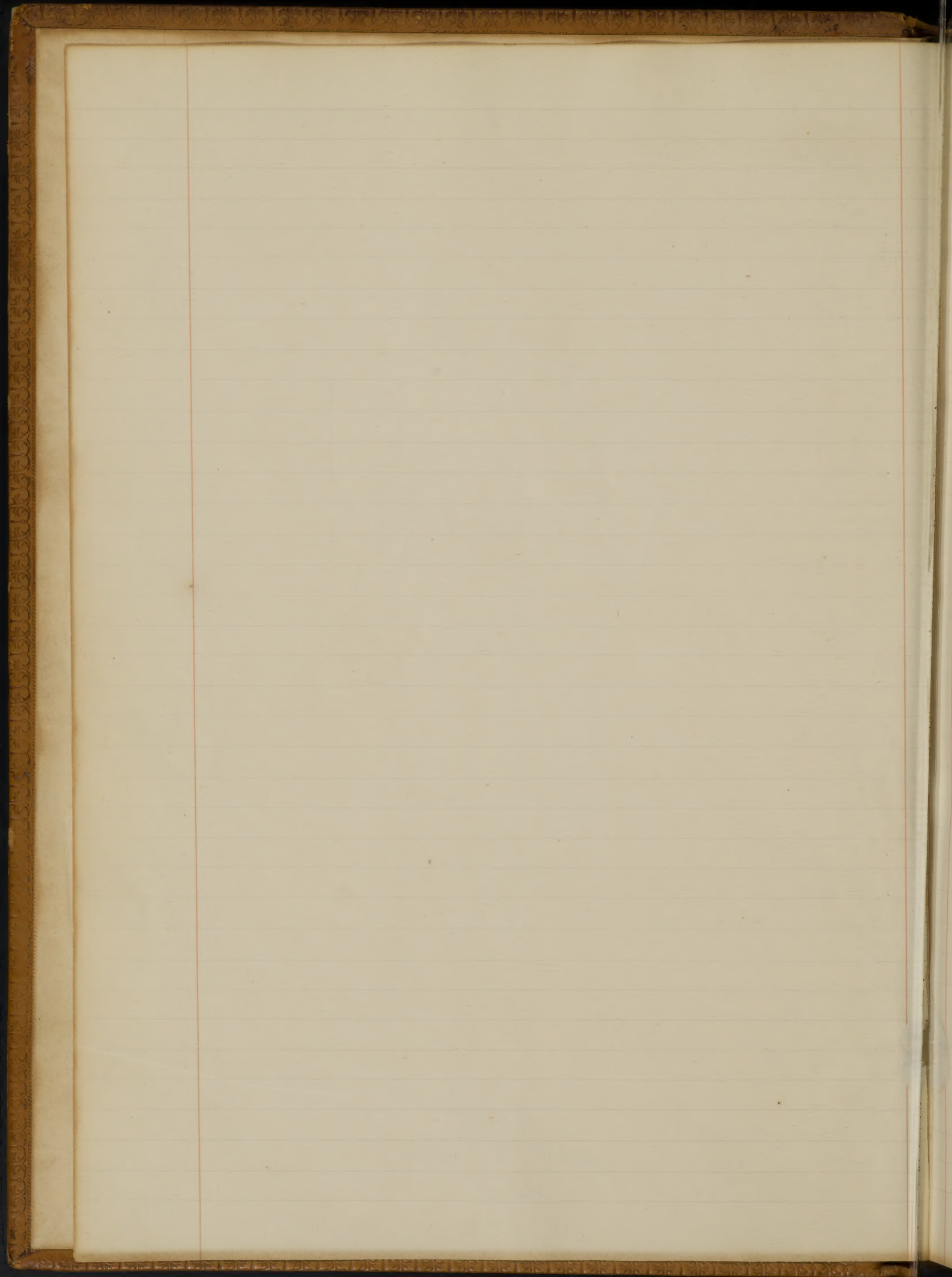
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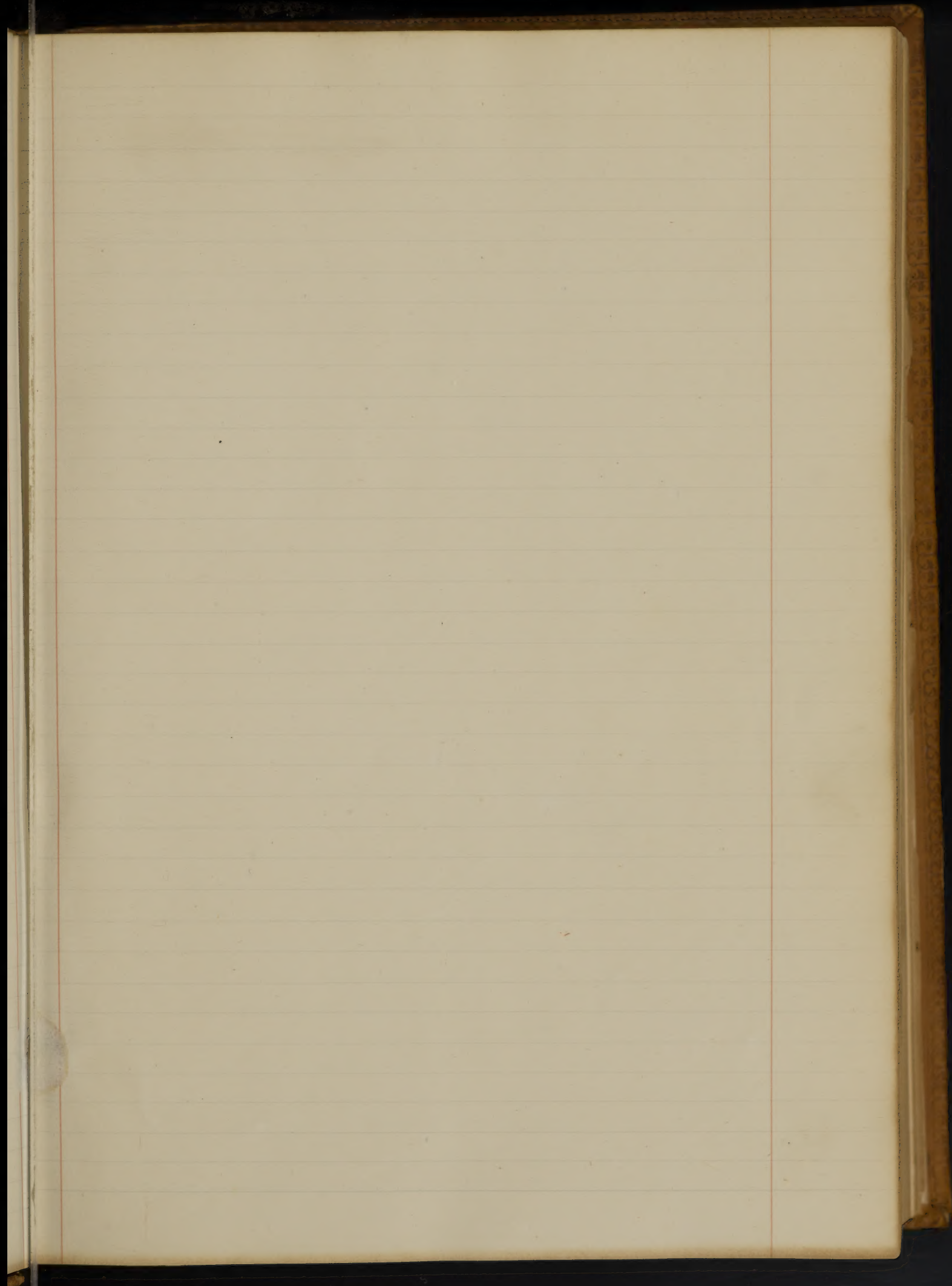
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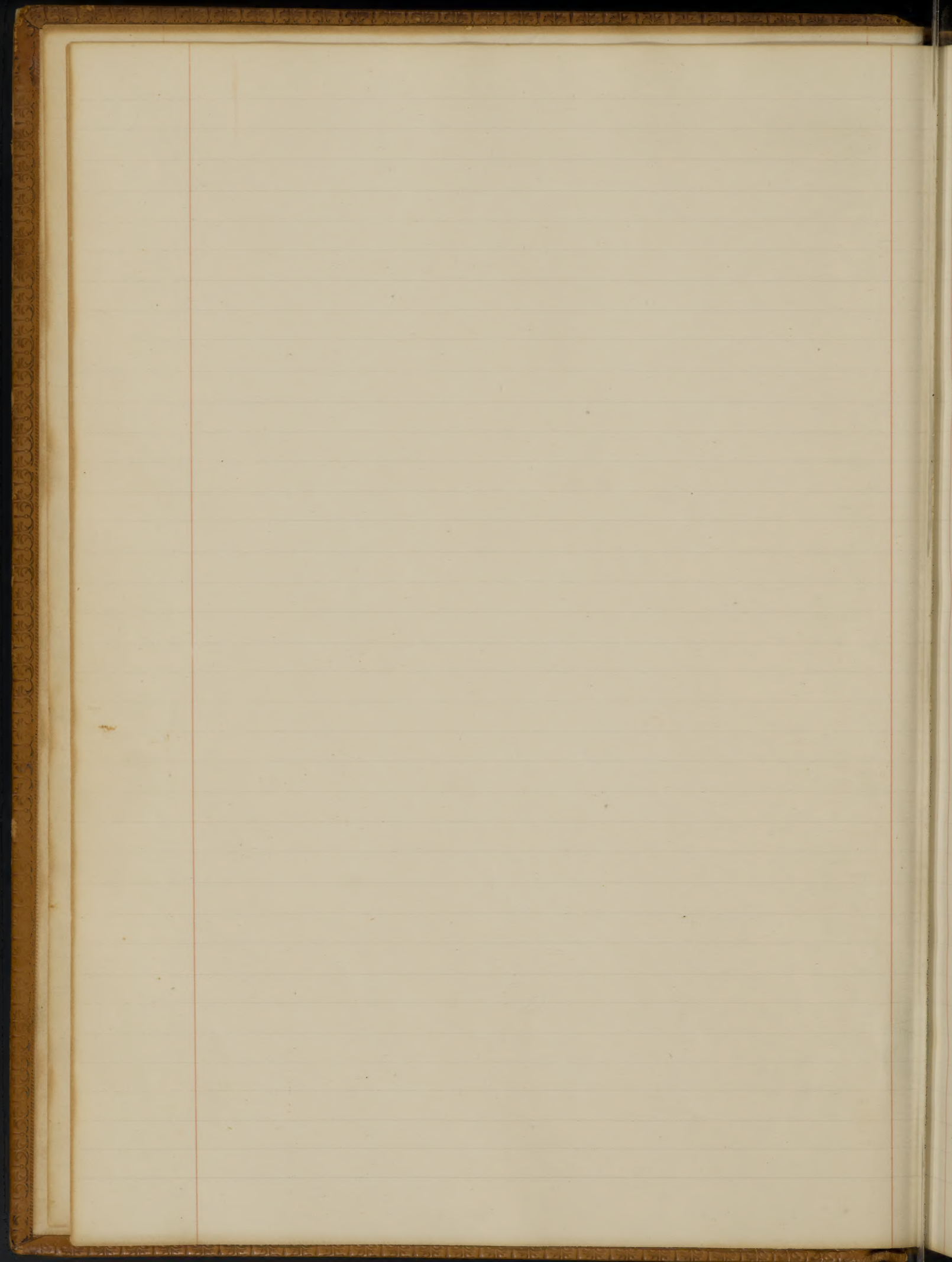
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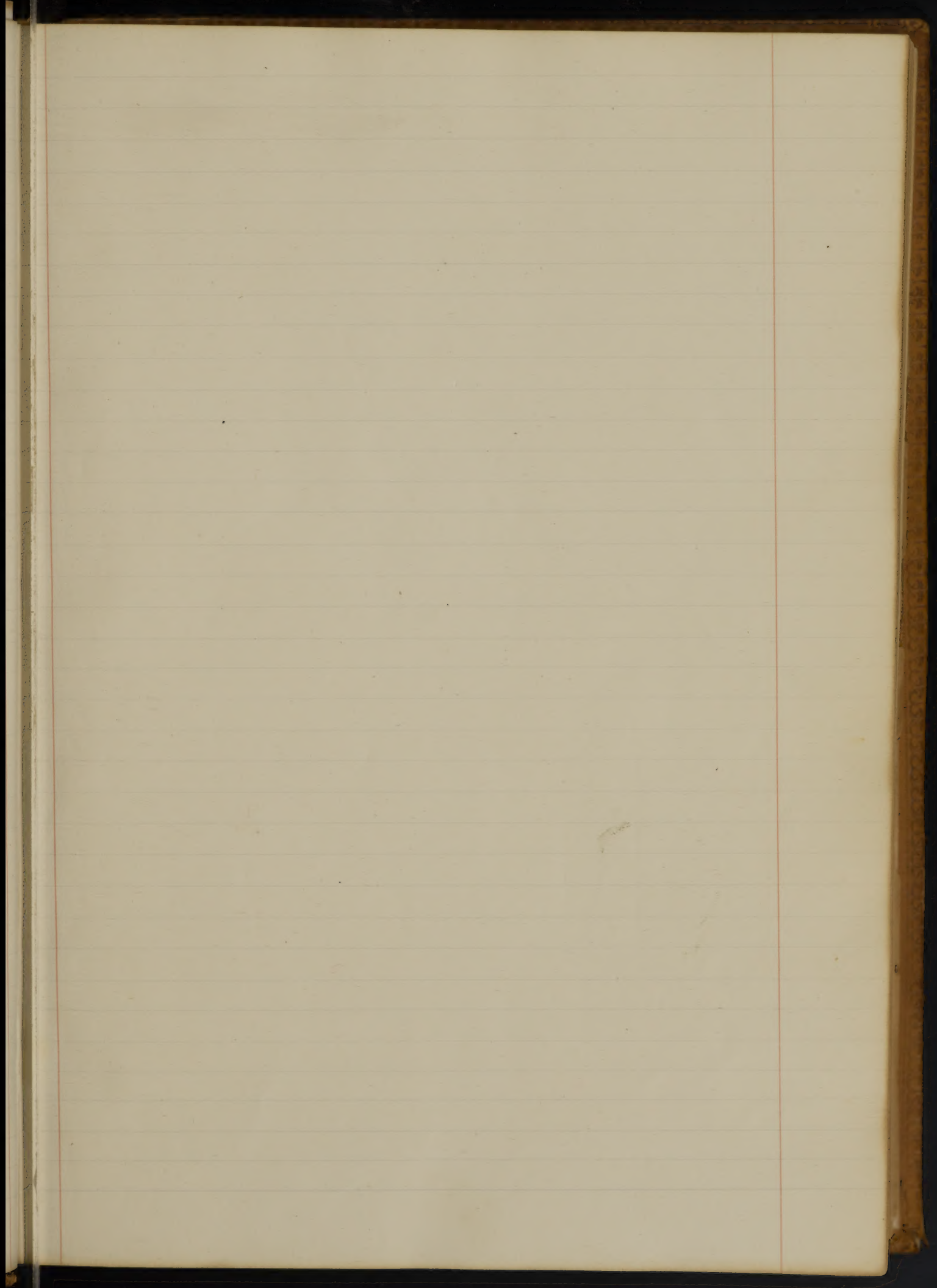


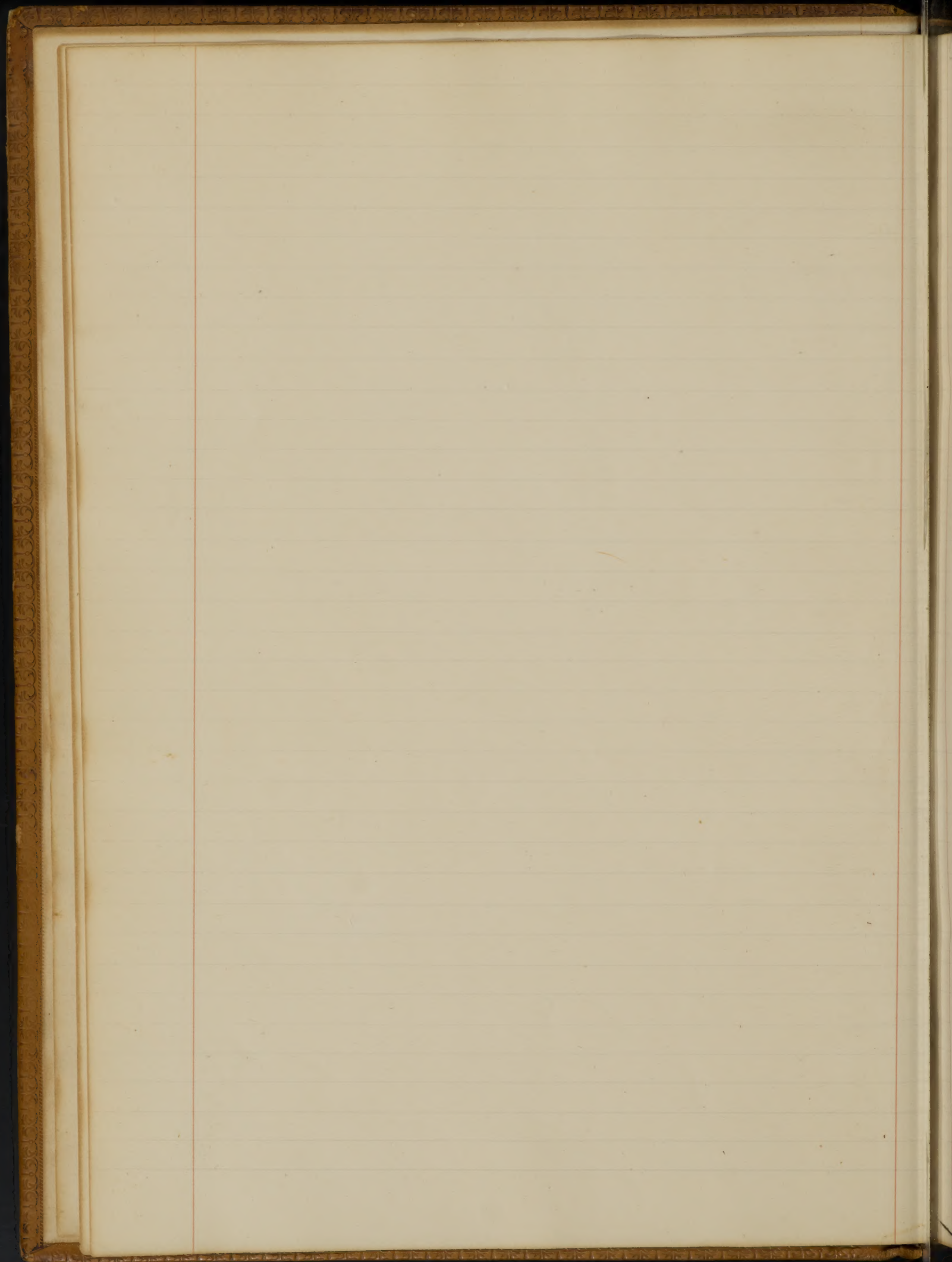


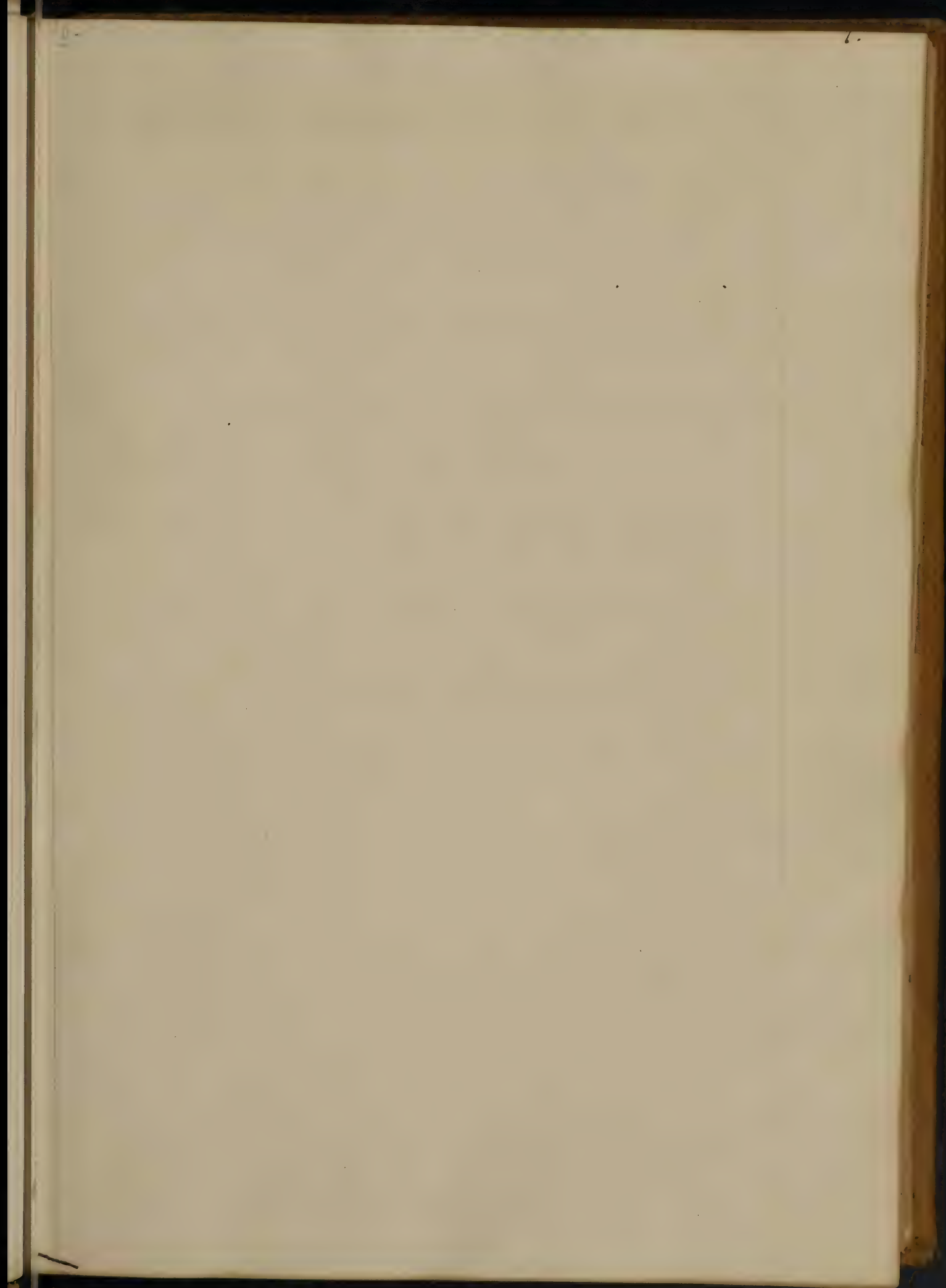












Who may maintain y actions:

10.

Action of Trespass for injuries to personal Property
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3.

Action of Trespass for Injuries to personal Property.

The action of Trespass is here treated under a division different from that found in y books where it has been included under one head. wh has here been divided into 3- heads.

I Trespass to y Person. or assault and Battery-
and False Imprisonmt.

II Trespass to Real Property as Quare Clausum
Fregit. or Quare domum fregit-

III Trespass to Personal Property or things
Personal wh is about to be considered

The Term Trespass in its most comprehensive sense. at C L denotes any transgression of the Law. short of Treason. Felony & Misbreason of Treason. so yt it includes all Misdemeanors as well ^{private} public injuries. 3 Bb. 208. Bac 107.

But in a less comprehensive sense it signifies any civil wrong committed with force to y injury of another person. or property. and in this sense it includes Assault and Battery. False Imprisonmt. or any forcible invasion of another's right. of property Real or Personal. and this y more general acceptation.
Esb 380.

The class of cases now to be considered comprehend only forcible Injuries to y Personal Property of another. for Trespass to y person is Assault and Battery or False Imprisonment.

The rights to Personal Property, it will be presumed are subject to 2 Species of Injuries

I To y abuse and damage of y Chattel, ymself, while y possⁿ continues in y legal owner.

II To their amotion or deprivation of possⁿ.
3 BB 145.

Personal property may be injured in a great variety of ways. witht altering y possⁿ as killing another's animal, poisoning ym or Inflicting a ^{corporal} hurt on ym. or wound upon them, or by any other act in generale wh takes away from y value of y Chattel. 3 BB 153.

The Remedy afforded by Law for every such abuse, while y ownership continues, if y act be committed with force and immediately injuring, is y action of Trespass, sometimes called Trespass vi et armis, a qualification appended to y word to distinguish it from Trespass on y case, yet y alteration is wholly unnecessary and tautological. 3 BB 153. Roll 558. Eb 598.

The action then lies only for such immediate injuries as are committed with force, and when y injury complained of is y immediate consequence of y forcible act. For any remote consequential damages accompanied by any tortious act. trespass on y case is y only remedy (the proper one) because y latter action excludes y idea of force.
Further distinction Post

As If A shd create a nuisance by throwing a Log,

into y street and y log falling shd strike y person
of B. or injure his property, y remedy is Trespass.

But if afterwards y body is at rest and B
in travelling shd hurt himself or horse or his
carriage, by riding over it, Trespass on the Case
wd^{be} y proper action, for this latter ^{case is not y immediate} consequence
of force wh consisted in throwing the log into
y Street.

If y party mistake his remedy by bringing Trespass, &
when he shd have brd Case, or Case when he shd
have brd Trespass, y fault is radically incurable.
If a verdict in y Pltffs favour, where there is this
defect on the declaration, will not save him.
6 TR 125. 2 Mod 131. Cro Ch. 141. 96.

The reason why such a mistake was fatal, is derived
from y 2 different species of Judgment originally
rendered at Law. in these cases. For when y
Pltff recovered in an action founded in force,
y Judgment was a "Capiature pro fine" in virtue
of wh y Def was taken into Custody and imprisoned
till he paid his fine. But where y injury
committed was wth force, as in Slander, Trover,
&c. y Judgment was "in misericordia", and a mere
nominal amercement was laid as in Case of
Slander. And now this y cause dovt obtain
in practice at present, still it is y general
foundation of y distinction between Trespass and
Case, and y incurable qualities are ~~in~~ of
mistake in choosing ym.

It has been said, yt y 2^d species of injury to Personal Property, so far as they are remedial by this action, is amotion or dispossession of y owners possⁿ. or an unlawful taking away. For an unlawful Detainer or conversion of y Chately is not remediable by this action, but by Trover, Detinue, or some action on the case, for y injury then consists in the nonfeasance, and not in misfeasance, and ^{for} this omission witht force. ^{the} this action of Trespass can't lie. 3 BC 152.

This action ant but to recover a Specific restoration of goods, but to recover damages.

There is even one case where Trespass will not lie for an unlawful taking, nor any other action at C^o Law as y unlawful taking of a Ship or goods at prize, and y reason is. yt y question of prize don't depend upon y Municipal Law of y Land, but on the Law of nations, and is triable only in a Ct of admiralty, where y party injured must seek his remedy, and not at C^o Law. Doug 5th 8.

But tamen y General Rule laid down, there are some instances, in wh tho y original taking was lawful, in such cases, as yt where any authority to take another's goods, is given by the Law itself, a subsequent forcible abuse of ym. makes y Party so doing, a Trespasser "ab initio", or as it is sometimes called "by Relation" so that he may be subjected in a declⁿ charging, yt he unlawfully and with force and arms, took and carried away y goods, when in point of fact, there was no so forcible and unlawful away. Bul 81. Cro J. 114
 1 Bac 20. Cro Ch. 146. 3 Hyl 20. 1 T^r 12. Co b 383. 405. 293C 1281.

As if a man's beast is taken as an Estray, and detained Damage Feawant and y party taking but y animals to labour, not only will an action lie w him. but an action of Trespass as for a taking wtht authority, and illegally, and yet y taking was legal. There y Def becomes trespasser by Relation.

There are various Examples of y kind, wh form Exceptions to y General Rule.

If a traveler enters an Inn, wh he has a Legal right to do, & afterwards commits a Trespass, as if he steals property, wh involves a Trespass, he becomes a Trespasser "ab initio" and is liable in this action for forcibly entering, and seizing y goods. tho' y original Entry was by licence of Law. 11 Co 140

So if y Shff^r having taken goods on Ex^{te}. uses or destroys ym. he becomes a trespasser by Relation, for by y subsequent act, y Law Judges "quo animo" y first entry was made. or Ex^{te} levied.

Thus it appears, that y doctrine of trespass by relation is a fiction in Law. Talk 221. 8 Co 146.

The principle of this Rule is. yt in every such case, y subsequent wrong extinguishes or revokes y licence of Law. and y wrong does. is adjudged to have done. y original act, not in virtue of y privilege given him in Law. but for y purpose of committing y wrong. Thus in y case of a Shff. seizing property under an Ex^{te} and afterwards applying it to his own use. and the Traveler who enters y Inn, and afterwards committed a Theft. These subsequent offences ^{show} "quo animo" y licence and authority of Law were exercised.

But to constitute a trespass, by Relation, y subsequent abuse must be of a positive character, as Misfeasance, and not merely a Nonfeasance, in itself a Trespassing act. Hence if y traveler under y circumstances above mentioned, instead of stealing, shd refuse to pay his fare, this omission being but an omission w^d not make him a Trespasser originally, and in this and similar cases, y subsequent abuse is remediable by case, except when Detinue will lie, 2 Rep. 200. Role. 588. 1 Role 2 130

There is one case, which has been supposed to come within y case of Trespass by Relation, and to form an Exception to y last rule. It is where y Pltff having taken goods on lawful process, don't return y writ, when y Law requires it, and is thereby subjected, as is supposed, as a Trespasser by Relation - 2 Role 583. Talk 469. vid Ta R 632. & Bac 162

This case has many times been treated of, as one in wh y Pltff is made a Trespasser, by Relation, but this is undoubtedly an Error, for y Rule already laid down, requiring a positive Tort, to constitute such a Trespass, admits of no Exceptⁿ.

The Principle of the Pltff liability is yt y process not having been returned in due form is void, and ergo not legal evi of y Lawfulness of y original taking. of wh y only proof yt can be offered, is yt y process itself under wh it was made, and that in this case not being matter of Record, from y want of a Return, is no evi at all. - It is a mere "Certe Blanket" from wh it don't appear. yt y original act

was done with authority. This case therefore don't prove an Exception to y General Rule, as to Trespass by Relation.

On y other hand where y owner of y property gives another license to take his chattels, y latter can never in general be a Trespasser by Relation, for any abuse of that license - This Rule is not universal) 8 Co 146. C. Yelv 537 Perkins Sec 191 & Bac 162

If A gives B authority to take his property and B abuses it. A has no remedy in Trespass but in Trover -

The principle of y distinction in these cases, where y license is given by Law, and by Consent of y party, is this. That in y former case, y law conferring y authority, without y consent of y party, who may suffer by it, will protect him vs the abuse of it. But in y latter, y sufferer himself having given y power, thereby choosing to whom he will entrust it, or his property, must take upon himself y abuse of it -

The Rule last mentioned holds in y common case of Bailment with one Exception for if a Person to whom goods or Personal chattels have been delivered, by the owner himself, wantonly destroys them, this action lies vs him. Here y Bailee becomes a Trespasser "ab initio", for such a wanton act distinguishes the Bailment, and shows that he took y goods originally not for y purpose of discharging his duty, but with intent to destroy ym. and therefore can't avail himself -

of his character of Bailee. Till 22 71. Co Litt 57a 56. 136 5 Bac 266

Who may maintain this action?

He and he only, in whom y possⁿ was, can either actual or constructive, in fact or in Law, at y time, y injury was done, for it is immaterial in whom it is at y time of bringing y action. 1 TR 480.
7. ibid 489. 3b 380. 1 TR 481

It is asked why Interest or property alone won't support this action? It may be answered, yt Trespass was framed for injuries to possⁿ and such alone. When one has Interest, he wint wint his remedy. tho he cant maintain this action, and the reason is y same, as why debt will not lie for a Trespass. because debt wasnt framed for Trespass.

Hence if a lets a chattel to B. as for six mthrs. to be used. See 4 Paik. 488. In this case Lord Kenyon held, that Towner was the lie, but subsequently 7. TR 9 a different decision was had.

A constructive possⁿ in y Plt^f at y time of y commission of y Trespass, is satis as vs a Stranger, but not vs a Bailee for he has a Special property. Hence if a deliver goods to B. as a mere depositary, retaining a right to demand ym whenever he pleases, yv gives him a possⁿ in Law during the whole period of y Bailment and if y goods are taken by a Stranger, he may maintain Trespass vs him.

So of a Common Carrier. 4 TR. 489. 7. ibid 9.
1. ibid 480.

Yet if y Bailee or carrier had converted goods to his own use, it wd not have maintained Trespass vs him, for he is not a stranger to y Property & because it wd be absurd to say ylt vs Bailee, y Bailor had y possⁿ, when y former has both y actual possⁿ and y right of possⁿ, and y wrong complained of is a mere breach of Trust. The constructive possⁿ of y Bailor is only as vs y Stranger, for tis a General Rule that any person, having the General Property, as contradistinguished from y Special Property, may sustain y^s action, is a stranger. The Reason of wh is abundantly explained, Lach 214. 2 Buls. 268. 1 Sid 438 2 Role 567.

And here to avoid mistakes or confusion, it is to be recollected, ylt the General Property must be accompanied with a right of Present possⁿ, for wlt y^s qualification, it cannot support this action. It is however in such case, y Bailee may maintain a Special action on the case for y Injury done, to his reversionary Interest, 1 Ch. Pl. 167. 3 Lev 207. 359. 2 Bul Cr 133. 4. 8 John. 432. 4 Wia 385.

Case don't require possⁿ either in fact or Law. It is a General Rule adapted to y circumstance, of every case. Bul 35. 7 TR 9. Ek 576. 1 TR 58.

As between y owner of goods and a mere Stranger, this distinction don't exist. for if there be possⁿ actual or constructive, Trespass will lie, & wlt either — 1 TR 480. 7. Wia 9. 4 Wia 489. Trover will ~~not~~ lie. Here these 2 actions are Concurrent —

He who has a Specie property with an actual ^{possession} may bring this action vs a Stranger. In the book, this has been held only of a higher class of Bailees. But now it extends to every Bailee. A lawful possⁿ alone, presumes some degree of property, and gives a title de vs action. The Possⁿ of a Lenden is Lawful. Co Lite 83 4 Co 84. 2 Saund 47.
 2 Cal. 1. 169

An agisting Farmer may bring Trespass for an unlawful Taking of y cattle. he is bastering - not sub. vide "Baileme"

Of a Bailee of goods, deliver them to a stranger, y Bailor cannot maintain this action vs y Stranger, for accepting them, for y acceptance is no Trespass, and he having received them from one who had the Lawful possⁿ is not a Tort Feasor. But if y Bailee had no authority to dispose of y Property, y Bailor may recover by Trover, after a demand and refusal, and here y wrong consists in the Detainer wh is a mere Omission, a positive but not a forcible Tort. 5 Bac 164. 75. Trespass. D.

When goods are sold or given to one, he may have Trespass vs a Stranger for taking ym before he has actual possⁿ.

However if the Transfer be by Gift, it must be something more than mere Parol. It must possess all y qualities necessary to pass the right

The Trespass is founded in Possⁿ, a general property being in y Donee and ~~under~~ after it y right of possⁿ. But in this case if a Sale or Gift with delivery, y vendee or Donee

draws a

can't maintain Trespass. as Vendor or Donor.
for y possⁿ of y Donor. or Vendor. was originally
lawful. and y injury complained of is y Refusal
to deliver. y detaining of y goods, not y unjust
taking - Hence after y demand Trover is y proper
remedy. Fulk. 214. 5 Bac 146.

If goods belonging to a Testator be wrongfully
taken away by a stranger, before y Will is
proved, y Ex^r may tamen maintain Trespass.
after it is proved, provided he has a Probate
at y time of declaring and it is ^{no} objection
yt he had not a Title when y Injury was
done. for by Law he had a constructive possⁿ.
upon y Testator's ^{death} before y proving of y Will. nor
does y Probate create in the Ex^r any Interest
or right, but is Ev^d only of that right. - an
Ev^d indeed Indispensible. 2 Buls. 268. 1 TR 480
5 Bac 164.

The Legatee of a Specific Chattel may support
his action for any Trespass. after the Ex^r has
assented to the legacy. but not otherwise -
(Supra).

But a Legatee cannot maintain an action
for goods bequeathed before actual possⁿ. even
after the Ex^r assents, in y legacy be Specific;
for before delivery, there are no goods in
particular wh belong to him. Suppose an
Testator &c

If trespass be b^{rt} for goods, belonging to 2.
 person, tenants in common, both must join,
 as Plt^y and if either sue alone, y D^{ef} may
 defeat ~~y action~~ y action by pleading y
 Non Joinder in abatement, for if he plead to
 y action as y General Issue, y Plt^y will
 prevail, and y reason is simply this, y fact
 yt there is another — who ought to be joined,
 "does^{nt}" appear from y Plea. "of not Guilty"
 wh only denies y taking of y goods, of y Plt^y.
 Salk 32. 3 Lev 354. Litt L. 320. Str 820. Esp 580.
 Contra Salk. 4 overruled.

There are cases or some cases where neither Trespass
 nor any Civil action will lie for a tortious taking
 of another's goods. Such as Theft Robbery, or where
 y unlawful act amounts to Felony, and these are
 founded on the doctrine of Merger. yt y Civil
 Injury is annihilated in y Public offence. 5 Bac 170
 Lev. 21. 47. Fel 90. Morda 283. Str 82.
 Such 144. Str 573. 2 Bul 131.

The Rule wd at first seem arbitrary, tho it ant.
 It is derived from the C Law principle, that felony
 works a forfeiture of goods, and chattel, of y Felon,
 and if attainted; his Real Estate.

and this absorbs all y means of private
 Redress. vid Ed 1 R 15-2 7 Bull 31. 3 Ed 1 R 170

Now fare y doctrine of Merger obtains in this
 country is not known. In Comt. "ratione
 cessante cessat Lex" for felony don't cause a
 forfeiture of y offender's property, nor of his life,
 except for heinous crimes, and ergo a civil action
 may and frequently is b^{rt} in Court for Theft &c.

In y declaration, y goods wh are y subject matter of y action, ought to be described with convenient certainty. The sort of goods ought to be mentioned —
 Es 2 Q 405.6

If y declaration charge with conveying away divers goods of y Pltff or y Pltffs goods without a description of the Species or y quantity, it is insufficient and ill in Demurrer, and even after verdict, for a recovery upon such a declaration wd be no bar to another action, for y same injury, as there, cd be no means, of determining for what in particular it was had. & because the def ought to have notice from y face of y declaration, of yt to wh he must answer, otherwise tis impossible for him to justify Es 405.6. 2 Sa Ray. 1410. 4 Burr. 2400. 5 Co 30. Fo 637

But y Rule holds only, where y injury to y goods is y gist of y action, for where only alleged, by way of aggravation, it is immaterial, how general y description be. 3 Wils 392. Es 406. 1 Hk 555

Even a general description is sufficient, when y injury is y Gist of y action, if it be made particular, by reference to something wh is certain. As Trespass for taking several keys. Objection no particular description, of y keys. Yet as y declⁿ described a particular dwelling house, of wh y Pltff was possessed, & alleged y Def had taken y keys for opening the door of certain rooms of y said house, y action was held to be well brot. for by referring to y house there cd be no doubt what keys were meant.

Salk 364. 1 Vent 114.

There are certain kinds of Trespasses of a Permanent nature i.e. capable of a continuance, or renewal.

wh. may be laid with a Continuance, & y. Plff. need not be under y. necessity of bringing a separate action for every days separate offence. But this mode is peculiar to Injuries to Real Property, at least no Exception as to Personal Chattels, is known.

Talk 638 La Ray 239. 2 Bb 212. Es 310. 407. 8.

If a Continuance is laid where it ought not to be, y. fault is incurable and can't be remedied even by verdict Talk 639. Es 408.

7 L - The decl^r must then contain an allegation of y. matter. Plff. possⁿ or right of possⁿ. Talk 640. Cro J. 46. of substance 4 TR 496. 1 ibid 480. 2 Lev 186. Es 400. 385. 417. 2 490. 1 Bb 480.

It is further necessary the value of y. goods sh^d be alleged, not the absolute value, but some supposed value, for if y. goods be witho value, y. Plff. is not injured. The original object of this Rule was to furnish y. Jury with a criterion of damages. But this is not ^{now} y. case, for y. Jury will not be governed by the Plffs statement except so far as not to go beyond it.

(This same Rule holds in Trover) 2 Lev 430. Cro J. 129. 1 Vent 114. 17. 317. Es 407. vide Es. 587 where he denies y^t y. value need be alleged in Trover. Not Law.

In verdict ascertain y. value. The omission to allege value is aided by verdict, for by implication it wd appear, y^t y. Plff. had proved y. value of y. goods, and the Jury

therefore made an assessment of damages in his favour.
 1 G. & 39. 5 Bac 195. Ep. 406-7. 4 Burr. 2455. where
 y Plea is admitted arguendo. see Bro S. 129.
 where it is doubted an y verdict will aid y
 Declat. 2 Lev. 230. 2 Burr. 174.

The Pltff must allege a certain, tho it may
 not be y true day when y Trespass was committed.
 He may ever lay it in a different year and
 a different day and month and prove y Contrary.
 Bull. 17. Hol. 104. Ep. 407-321. 314. 415. Cro. E. 32.

The Plaintiffs of y time committing injuries,
 "ex Delictis" is seldom material. They ^{may} must be
 proved to have been committed either on a day
 subsequent or anterior to that stated in the Declat.

If a Defendant plead a Release on a day see last
page.
 subsequent to that laid in y declaration, leaving
 a space of time intervening between y day of Release
 and y time of bringing the action, y Pltff has
 a right as above stated to prove yt y trespass
 was committed at any time before or after
 yt alleged in the declaration and before y
 commencement of the Suit. Otherwise Judgment will
 be awarded vs him. as for want of a Plea.
 As to y time, tis now only matter of Form, and
 an omission fatal on Special Demurrer only.

The pending of another Suit vs y same party for
 y same offence. is a good Plea in abatement, but not
 to y action. 5 Co 2 61. Carlk 96. 1 Bac 13.

The pendency of a Prior action vs a Stranger, is not pleadable at all, either in abatement or in Bar. to y action. if a Trespass was committed by 2 or more persons. y Plt^y might proceed vs them in a Several or Jo^{int} action & he may sue one or any number of ym. short of y whole, or y whole. but a recovery of a Judgment in one action will be a good Bar to damages in another. Hob 138. Str 420. 5 Bac 192. 3 Cro 573. Str 1078. Ek 593. 4 Bac 489. See Thom. 60

If a Judgment be recovered vs 2 or more defts. and one of ym is compelled to pay y whole amt. he can't oblige the others to reimburse any part. and this Rule is common to all Torts. 8 TR 188. Hard 164.

The Reason is. y Law will never raise a promise of Indemnity or any other promise between y Parties to an illegal contract as it does between those who are jointly concerned in a Legal act. for the Law presumes an agreement on y part of each to pay his proportion of y loss incurred

Where y defence consists in a Justification, it must be specially pleaded and not given in Ev under y General Evidence Issue. Thus if y Def confesses y taking and relies upon y fact yt y Plt^y gave him a licence or yt as Th^{ft} he took y goods by virtue of a Process, he can't give either under y General Issue. for y General Issue ^{denies} claims y taking, while y Justification acknowledges it and they thus become inconsistent with one another.

Co Litt 282. Str 61. Ek 411.

And in an action vs 2 or ^{more} Defs. if one make default, or suffer Judgment by "Nisi Dicit" or on his several Pleas be found guilty, but y^e then plead any Justification, or defence whatever, wh^{ch} show the Plt^f had no cause or right of action vs either. & that Plea be found good, final Judgment cannot go vs y^e former.

Thus suppose A and B. be sued, and A suffer a Default, or be found guilty, but B pleads licence, release, and it be so decided by the Jury. y^e Plt^f can't have ~~go~~ judgment vs A. for it appears from the whole record that he had no just cause of action vs either. Hob. 54. La Ray 1374. Esp 421. 1 St. 610

By the C Law it is necessary y^t y^e declaration contain y^e words ^{et contra pacem} "Nisi Dicit" & as these are words of substance, y^e omission of y^m is fatal. The Reason of wh^{ch}, is that there were 2 Species of Judgment rendered at C Law. in civil actions, where y^e Tort was committed with or without force. In the former y^e Judgment was "a Captator was fine" wh^{ch} could not be awarded ni y^e decl^r alleged "with force and arms" In the latter, it was Mercenarius, when no such allegation was necessary. 8 Co 39 [2] Talk 636. Cro B. 463. or 443. 52 b-36. Esp 408. 4. Mac. 11.

Now indeed y^e Judgment of Captator, was ^{is} abolished, by 5. H⁷ and many, and ant^y now in use, in this country - Still as this is substituted a different proceeding for "y^e Captator" a distinction still remains, wh^{ch} makes it necessary to insert these words, in the decl^r. tho' not for y^e same reason. 2 Talk 636. 5 Bac 196. Contra La Ray 985. not Law.

For y same reason it is necessary to ~~say~~
 yt the declⁿ contain y words "contra pacem"
 These two words of substance and wth them
 y words "vi et armis" are insufficient The
 Trespass implies a breach of peace, nor can
 there be a breach of peace wth force, nor
 Tortious force wth breach of peace.
 Est. 408. 2 Salk. 636. Carlk 56. Cro. B. 426-43.

The omission of these words is a defect now aided
 by Act of Amendments. or Joinder 1b. 17. Ch. 2^d.
 Hence y omission is not made good, while
 it remains, but only authority is given to amend
 y declⁿ. by inserting these words ⁶⁴⁰ after wh
 Judgment may be rendered. Salk. 420. Cp 408.

In Court before these phrases have been regarded
 as matter of Form only. The C Law reason
 for considering them essential never existed
 here. There never was any difference between
 y Indgments when y wrong complained of, was
 done wth force or wth force. It is otherwise
 in many of the States. However even here
 y want of ym is Fatal on Special Demurrer.

The deviation from form is always permissible
 as form tends to preserve y boundaries between
 y different actions.

I'm pleading a Release, def shd plead, guilty as to
 Trespass before action brot and alledge Release as to
 ym. but Specially traverse all Trespasses subsequent
 to action, and plead not guilty as to ym - or
 rather subjct to Release.

17
Action of Trespass on the Case
"Ansung Ex Delicto"

The action of Trespass on the Case answering Ex Litteto.

This action lies in 3 classes of cases.

First It lies for wrongful acts not committed with force, as trover, slander - malicious prosecution

Second It lies for culpable neglect, or omission which occasions an injury, as for a Nonfeasance - under y. former Rule, head. y. wrong complained of is a Nonfeasance.

Third It lies to recover consequential damages occasioned by acts, which are forcible. For an immediate injury occasioned by forcible act, Trespass vi et armis, is y. proper remedy.

Bul 74. 3 B6 122.3 Esp 598. 2 T.R. 167. 2 B.R. 895

This action lies for wrongs not committed with force.

Thus trover is an action of trespass on y. case. Here y. wrong is a conversion, but not committed with force.

An action for malicious Prosecution is y. same unaccompanied with force. Same of Slander.

Trud mala promiss by a Physician. voluntary Escape y. Return day of y. writ by a Sheriff.

II The second class of cases is those of culpable neglect, or nonfeasance, as in the case of a Negligent Escape. This is a Nonfeasance but still a wrong.

It lies vs Bailee for neglect of duty. It also lies vs any Servant of full age for neglect of duty.

II. It lies for consequential injury occasioned by acts which are committed by force, or with force, and is laid in declaring with a "per quod" Thus if A digs a pit in y highway, and B's carriage or horse is injured in consequence in passing. B's remedy is an action on the case, with a "Per quod" &c for consequential damage.

Again if A's Servant is beaten, and A brings an action for the consequential damage, in loss of Service, y proper action is case. (Tho in Eng. Trespass has always been brot, and y reason is y form of declaring is like that in Trespass).

Of the Servant himself sue, y proper remedy is Trespass for y injury to him is y immediate consequence of the force used. Per 636. 2 TR 167.

Actions on y case are generally derived from y Equity of the Sc of Westminster 2^d Edw 1. This Sc is regarded as the Parent of actions on y Case. No such thing by C Law. 3 Bl. 57. 2. 3. 3 Reeve & L. His. 89. 243. 2 TR 129. 2 Lev 20. 3 Bl 123. 3 TR 51. 2

On Count a distinction has been made in y forms of declaring between actions on the Case, on Count. I Trespass on the Case for Torts. But no such distinction exists - all actions on the Case are actions of Trespass on the case. 3 Bl 208. 3 Reeves His. C L. 243. 234.

The distinction between Trespass and Trespass on the case, is radical in Law, and if Trespass is brot, when case is y proper action, y declⁿ is defective, and nothing can aid it. Not

good even after verdict. Judgment may be arrested.
 The Reason why the mistake is thus fatal, is
 founded on y 2 different forms of Judgment rendered
 at C Law. In every action for an injury committed
 with force, y Judgment is a Capiatur "for fine"
 When y injury is not committed with force,
 y Judgment is a Misericordia. 5 Bac 191. 3. 4 ibid
 11. 6 TR 125. 2 Mod 131-

per!

In determining when an action shd be Trespass
 and when Case much difficulty has arisen.
 When there is no force in any part of y
 transaction, case is always the proper remedy.
 But when y original act, wh occasions y injury
 is forcible. Trespass and sometimes Trespass on y
 case is y proper remedy.

The Rule of distinction is simple but there is much
 difficulty in y application.

Rule. where y forcible act is immediately
 Injurious and y remedy sought is ^{for} that
 immediate injury. Trespass vi et armis is y
 proper remedy, and y only one. But if y
 injury is consequential, not y immediate effect
 of y forcible act, Trespass on the case is y
 proper remedy. this act occasions y injury and is / direct

As If. A commits a Battery on B. and B
 sue, his remedy is Trespass, for y gist of y action
 is y corporal injury, and that is y immediate
 consequence of y force. So if A falsely imprison
 B. for y injury is committed with force.

If A forcibly destroys B's property, or forcibly takes it away. Trespass is y proper remedy, tho' trover will lie by Fiction -

But suppose A's Servant is beaten, and that A in consequence has sustained a loss, here cause is y proper remedy, for the injury is consequential.

Suppose that A cast a rock into y Highway, if in casting it, he shd injure y body or property of D. D's proper remedy is Trespass. But if after y rock is at rest, D shd drive over it and injure himself or property - his remedy wd be Trespass on y case. Here y injury is consequential.

If y force has terminated, before y injury complained of has commenced, y injury is always consequential? 2 B.R. 892. 6 T.R. 123.5. 53.4. 2 Bul 20. 79. Ray 407. 2 T.R. 170. 2d Ray 1032. Fawk 388 2 N.R. 476.

The Injury or damage complained of, need not necessarily be instantaneous effect of the force used to be y immediate effect of it. If a forcible act produces by an uninterrupted train of cause and effect, an injury to another, it is considered as an immediate injury.

As Suppose A casts from him an elastic body on y ground wh shd bound and rebound 10 times and then strike B. Here y injury to B is y immediate effect of y force & y remedy is Trespass.

The vis impressa first communicated continues throughout. As a Ball bounds and rebounds on a pavement, Trespass is y proper remedy. 2 Bl 899
 900. Set vs Sphera.

But where y original force has ceased before y injury or damage commences, y damage is consequential, and y author when liable at all, is liable in Case and not in Trespass.

Now If A shd throw a stone at B. and hit him, Trespass wd be y proper remedy, for y injury is y immediate effect used.

But where y injury is produced by the Intervention of a 3^d person, he being a rational agent, he who first set y Instrument in motion, will not be liable. —

18 vs luntary

As suppose A shd cast a Football on y ground, wh shd bound, and rebound, and break y window of B. Here B's remedy wd be Trespass. But if A shd throw such a Ball on the ground, and B shd interfere, and give it a new direction, so that it breaks C's window, A is not liable at all. It is y act of B. and he is liable in Trespass. Here y injury is not y effect of force impressed upon it by A.

So y Case of a Mit ante.

If A fires a Ball at a mark, wh after glancing any number of times, injures B, he is liable in Trespass. So if in cutting Timber, he permits it to fall upon y land, or building of B. he is liable in Trespass. He is considered as y

author of y force by y tree, since tis made to strike
y building Dc. of B. Ray 407. 1 Mod 24. 3 East 523.

Of A erects a Spout under y Eaves of his building,
so yt when it rains, y water falls upon y land
of B. B's remedy for this injury, is ease, not
Trespass. (for y injury (int this case is the instantaneous
effect of the forcible act of A.) for y act of
A ceases before y injury commences. & a new
distinct cause. Ie. y rain is necessary to complete
y injury. Str 636.

But if A shd cut down a head of Water,
so that B's land is deluged, B's remedy is
Trespass. for y injury in this case is y instantaneous
effect of the forcible act of A. - The Case is y
same, as if he cast y water upon y Back
or land of B. by means of a Pump.
2 Bb R 892. See vs Shepherd.

The Case of *Scott vs Shepherd* is a leading
case in this doctrine. it threw a squib into
a market. It fell upon the Stall of B, B
to protect himself and y wares of B, threw it
across the market house, and it fell upon the
Stall of D, who thrust it off in self defence,
and it struck y Pltff in y face, and put
out his Eye. Trespass lay vs A, I was
not considered in brushing it off, as a rational
voluntary agent. - He acted from necessity
and self defence.

A y owner of a Mad Dc, turned it into y
street to make Sport. The ox, severely injured

B. by going him. B. lost Trespass vs A, and recovered. A set y on in motion, and y case is y same as if he had ^{on y case} sat in motion an inanimate body. 2 Bl., 892.

But where A. imprudently rode a wild horse into a place of Public Record, and y horse ran away with him, and injured B. Bedley, Decided y^t trespass ^{on y case} was y proper remedy, for so far as regarded y force wh injured B.. A was merely Passive, y act of ~~force~~ was therefore wasn't his act. His liability arose merely from Imprudence. 1 Vent 298. 2 Lev. 172. case.

If A in driving his carriage, wilfully or negligently drove vs y carriage of B. B's remedy is Trespass. The form of y action doesn't depend upon y fact of negligence, or wilfulness. It depends upon y act, and not y intentions. It depends upon y fact, an y injury is y immediate effect of y force, or not. Here y act of driving vs A's carriage by B. (change y letters) is an act of violence & y injury is y immediate effect of y violence.

If A in defending himself from an assault, unintentionally strikes B. beating him. - Trespass lies, for y injury is y immediate effect of y forcible act. 2 Bl R. 892 2 N R. 117. E, East 593

There is one case, wh seems to militate vs this distinction. W. A in driving his cart negligently let it run with force vs the horse of B, and lamed him. Case was lost, and held to be y proper remedy. 2 N R 117. But the decision

in yt case was founded on y peculiar form of y declⁿ wh was. "Mat y Cart of y def. he driving negligently, ran vs y horse of y Plff. and lamed him. The Declⁿ didnt state y injury as occasioned by a. 18. it didnt allege yt y act was y act of a.

See y above case commented upon. 3 East 593. 8 T.R. 888. same reason given. Had y declⁿ charged y Def with negligently driving &c. y declⁿ wd have been supported.

A discharged a gun y ward of wh lodged near B's barn, caught in combustibles, and burnt y Barn. Held y case was y proper remedy. Cro E. 10. Here y forcible act of A terminated before y damage commenced. The burning of y Barn was a distinct intervening cause.

If I dig a trench on my land, and thus divert an ancient watercourse from B's land. Case is y proper remedy. Here y proximate cause of y damage, is not a continuance of y force. The proximate cause of it is not forcible, it is merely negative i.e. a failure of y stream. 2^d Wils 170. 10 Mod 538. 10 Mod 538. 2.

A sued B, alleging that B's vessel was negligently driven vs him. (A's) vessel, 18 was so negligently steered, yt it ran vs B. I suppose and the Ct held yt Case was y proper remedy. Now if Def had negligently steered his own vessel and it had run vs the Plff's. Treason without doubt wd have been y proper remedy. If pilot probably steered y vessel, & there is a difference

Between cases where one is sued for his own act,
and where sued for y act of his servant. 8 T.R.
188. 3 East 523. 3 Comm R. 712.

The Rule yt where y injury is y immediate effect
of y physical force used. Trespass is y proper remedy.
holds only where y action is brt vs y person
who committed y wrong. i.e. employed y force.

If a Servant in driving his master's carriage,
drives it vs y carriage of another, y he, y servant
is liable in Trespass. But y Master is liable
only in case, for he is liable only y ground
of Imprudence in employing an unskillful Servant.
6 T.R. 125. 2 H Bl. 442. 5 T.R. 649. 1 East 100. 1 B & C
P. 472. St. 1083.

Upon y principle Case was held to be y proper
action, where y Deft ship ran over y Deft boat.
thru y negligence of y Pilot. 2 N.R. 446. 7 T.R. 79.
1 B & C P. 472. Pilot was liable in Trespass.

Where case is brt for consequential injuries arising
out of a forcible act, y declarⁿ is not vitiated,
by alleging that y act was committed with
force and arms. This allegation does not make
a declarⁿ in Trespass, for y allegation is only ^{bad}
matter of Inducement. It is only descriptive of y
manner in wh y injury is occasioned.

Indeed where y damage is y consequence of y forcible
act, it is proper to state y force and arms.
2 Reeve His Eng Law 244.

Whether y original forcible act, wh occasioned y damage, was itself lawful, or not, does not determine y form of y action to be brt. Tho it has been contended, yt where y act is itself unlawful, Trespass is in all cases y proper remedy.

This cannot be the Criterion in civil actions - E.G. case of an assault in *Trout &c* ante. 2 Bl R 592. &c.

In what cases it lies?

It lies for a great variety of Misfeasances and Nonfeasances, for a great variety of acts not forcible - as culpable neglects & omissions, and also for consequential damages occasioned by forcible acts. 1 Br 44. 3 Bl 52. 122

Trover. Slander. and Malicious prosecution are all actions on y case. These have been distinctly considered.

Any mere neglect for wh this action lies, on y ground of a wrong, or Tort must be a neglect of some duty imposed by Law. and not a mere Moral duty, and Mal neglect must be followed by some damages to another. *Id* Ray 17. Cro E. 219. Co 599.

In Cro E 219. A found paper wh was allowed to decay and injure said yt a wasnt liable for any neglect. This proposition ant correct. The Finder is bound to use proper care.

I. This action lies for any neglect of any officer of y Law. to y injury of another. As is a *Th*

for y neglect of his official duties, and vs all ministerial officers generally. 1 Roll 98. E's D 583. Volk 323. Bb P 360

It lies vs an agent for any neglect of legal duty on his part to y Injury of his Principal. As for neglecting to effect Insurance according to Instructions given by his Principal, in wh case he is liable in y event of a Loss precisely as an Insurer wd have been.

In some cases an action lies vs a Foreign Correspondent, for neglecting an Insurance.

I Where a correspondent abroad has effects of y principal in his hands, and neglects to make insurance according to instructions given, in case of a loss, he is liable. Indeed a Correspondent having effects &c is quoad y effects an Agent.

II Where one has been in y habit of affecting an Insurance for another who resides abroad, and has not given notice, y^t he shall ^{inve}discontinue y practice, he is liable in case of a Loss, if he fails to insure according to Instructions.

III Where one accepts a bill of Lading on condition of effecting Insurance for y Consignor, and neglects to insure according to Instructions, he is liable as an Insurer wd have been, in case an Insurance had been effected. Marsh Ins. 74. 208. 6. Park 303.

7th R. 157. 2 ibid 188.

A mere voluntary Agent who receives no reward for his agency, if he proceeds to execute the Trust, in that character, and does so negligently to y injury of his employer, is liable. 1 R. 109. Marsh 269.

If he does not, however, to enter upon y performance

of a gratuitous undertaking or promise, he is not liable ~~for it~~ to any action, for it imposes no obligation or promise, he is not liable to any action for it imposes no obligation or promise. See if he commences performance.

As Master of a Ship undertakes to carry goods without reward, and receives ym in pursuance of y agreement, he is liable for subsequent neglect. And he wd not have been on the promise or agreement had he not commenced performance. 20 R. 74. Mark 206 Y. 9.

A person performing business for another, in y line of his professional business or occupation, is liable either for neglect or unskillfulness for he impliedly agrees to perform a work skillfully.

But if y work to be done is not in y line of his profession, he is liable for neglect only, and not for want of skill.

He undertakes merely for fidelity, i.e. if there be no Express agreement to perform it skillfully -
As 1^a A Tailor undertakes to make a Garment.
2^a A Blacksmith makes a similar engagement.
3^a A Ray 214. 2 Hill 358. 20 R 601.

If a Surgeon by neglect or gross ignorance, injure his Patient, he is liable for y injury in y action. Mala Praxis forms one head under actions on y case. 2 Wils 339. 3 East 148. 2 R 213 Esp 2. 511.

But if y Person undertaking, and make^{10 R 601} Physic or Surgery his profession, it is said, he is not liable even for neglect, for tis said to

to be y patient's folly to employ such a man
 Est. 601. (3 Bb. 122. 166 ^{or true doctrine}) & R 214

This Rule cannot be Law. He ant liable for
 want of skill, but he like every other person,
 impliedly undertakes to use care and good faith
 Est has no authority to support him.

It lies in general vs any one, by whose act or
 culpable neglect, y health of another is injured
 or impaired as vs any one who sells bad wine
 or bad provisions. So vs any one who carries
 on a noisome trade, in a neighbourhood by wh^y
 health of a family is impaired. Holt 135.
 9 Co or Do. 52. 3 Bb 122. 166. 1 Roll 905

As regards y Sale of provisions, it is a Rule
 yt where one sells provisions of any kind, he
 impliedly warrants ym to be good and wholesome.
 This Rule is peculiar and doesn't hold as to
 sale of any thing else at C Law. 1 Fortb 110. 3 Bb 168. 6.

For mischief done by a dog ^{by} biting and it is y
 a Rule. yt if y dog was addicted to mischief
 of this kind and y owner knew it, he is liable.
 But wthout such knowledge he ant liable.
 at C Law. Cro E 350. 2 Salk 662. 3 ibid 12.
 Est 601. 2.

In y last case. Science in y owner is of y gist
 of y action and if y dect^r doesn't alledge it
 it is radically defective and not aided by
 verdict.

If y owner had previous notice of y damage
 sustained of a similar kind, tho upon a different
 species of animals, he wd be liable. Not

necessary that y mischief shd be y same quoad
y subject or animal injured. Talk 662. La Ray
209 4 Co 18. B. 3 Talk 13
186

It is said in 4 Co. 186. yt y allegation of
science in y accl^r is not traversable.
By yt is meant. it aint y subject of a Special
traverse, as it amounts to y Gen Issue.

For an injury done by an animal fera natura.
y owner is liable even without notice, for such
animals ~~were~~ are always supposed to be
addicted to mischief. The Law considers that
y owner has notice before hand. 2 La Ray 606.
Cro Ch. 254.

It lies for a disturbance or for hindering one
in y enjoyment of a lawful right, and y^s right
is generally an incorporeal right, (for a corporeal
right trespass lies. As diverting an ancient
water course. So for obstructing a right of way.
There are incorporeal rights. 9 Co 112. Cro E. 840.
Str 5. 648. 3 Lev 260. 2 Bb 236. 241. 1 Vent. 270.
2. ibid 186.

It lies in case of Escapes in any broker, officer
of the Law. who permit an Escape either on meore
or final process of one legally arrested.

Anceinly no action now is only remedy, nor a
Shff for an Escape of any kind. But by St 1.
Rich. 2. y Shff is liable in debt, for an Escape
on Final Process. This does not for Escapes
on Meore Process, for y damages are in such cases
presumptive. 2 Bac 240. Cro E. 17. 2 TR 126.
Eb 609. 2 Str 873. Shff and Gaoler. 2 Bul R. 5. 8

Of a Sheriff having arrested in Mesne Process, refusing to take satis Bail, when tendered, he is liable to an action ~~on the case~~ to y party arrested for in such case, it is his duty to take sufficient bail when offered. "Case" is y proper remedy for y abuse of his authority is a negative, not a forcible act. 2 Mil. 313. Cro Ch. 141. or 196. 2 Mod 31. & Co 146. b. 1 Leon. 198. This rule will not hold of final process y party not being entitled to bail

Of a person arrested on Mesne process is rescued this action lies in favour of y Plt in y process, vs the Rescuer. The gist of action is, yt y Plt has lost his suit, or y pledge of y person of y Def. by their wrongful intervention. Bul 62. d. Mod 211. Hob. 180. Cro J. 419. 420. 607. 608 & T.R. 227

Sheriff and Gaoler

Said in Hob. 180. yt either mesne or case will lie. See Quere. as to Trespass.

For rescue on mesne process. y officer has no action, for rescue, in such case, excuses him, from liability to y Plt of course. he sustains no injury

But in case of Rescue on final process, it lies either in favour of the Plt in y process, or y officer from whom y property was rescued, for y officer is then liable to y Plt, rescue being then no excuse. Litt 98. Cro Ch. 77. 609. 610.

In y action vs the rescuer. y Jury may give Ch. 610. what damages they please. Of course it is Bull 62. Expedient in all cases, for y Plt to show, if he can yt y party rescued is Insolvent, or out of reach of Process.

If upon Review upon final process, Pltff sues
 a Reviewer, & Pltff is discharged. Having made his
 election, he is bound by it. So said by 13b 510.
 He has no authority to support him, but a Rule
 seems reasonable.

This action lies for making a false return
 to a writ, and may according to the nature of
 the falsity, be sustained either by the Pltff or Def.
 in a writ. If he falsely return non est
 inventus, or nulla Bona, he is liable to a Pltff.
 But if he ^{make a side} return of service, and a writ proceed,
 he is liable to a Def. 11 Wil, 336. 15 659. 13b.
 510. Pro E 729.

It lies vs an officer for omitting to execute
 legal process when it was his duty to execute it;
 as for not executing a process of arrest when
 he might have done it: 2 And ²³⁴ La Ray,
 331.

Attornies are liable in this action for a neglect
 of duty injurious to their clients. They are liable
 for professional misconduct, injurious to a adverse
 party. C. G.

1st Atty neglects to appear for his client, so
 that he is nonsuited, & Client is entitled to an action
 in time. 2 Wil, 320. 4 Jun 2000. Talk 80. 13b 507.

2^d when after a nonsuit suffered by the Pltff,
 his atty entered up Judgmt vs the adverse party.
 (in fraud of a Ct) held yt a action lay in
 fraud of the atty in favour of a Def. in a
 former suit. Hutt 120. 13b 613. 3 Wil, 377.
 And 209. 3 BB 160.

If one be placed upon a Ct of Justice,
injuriously to another, he is liable to vs action -
as a personates B in a Ct of Justice, and
confesses in that character, B may have vs
action pro A. 1 Roll 100.

He lies vs magistrates - As Justices of y peace,
for refusing to perform any special duty - as
refusing to take bail in a bailable offence.
Refusing to certify the acknowledgment of
a deed. - To sign a writ when tis his duty to
do it. - To take depositions &c. as y Law
requires. &c. Hawk P C. 90. Ck 618. 1 Lem 323.

If y Plt in a civil suit settle y controversy,
before y writ is returned, and the Plt neglects
to countermand y writ, so y't y def is subjected
to expence by y return, he cannot for y cause,
have vs action vs the Plt; for it aint y legal
duty of y Plt to countermand y writ. The def
shd have made a stipulation to yt effect.

Tho if after y parties have put an end to y
suit by compromise, y Plt shd proceed in the
suit, he wd be liable in Malicious Prosecution
1 B et P 388. 2 Wils 302.

This action lies vs an officer or Corporation,
for making a false return to a Mandamus,
because y return is conclusive on y trial of
y Mandamus. (ie. y writ) The adverse party
cannot at C Law controvert y Return.

But now as by the St of Ann, such a
false return may be traversed on the Trial of

of y Mandamus, y action will not lie for y
false Return. 1 Vent III. Talk 32. Doug. 134.
Esp 648.

In Count this action never lay in such cases,
for thi we're no such st, yet our own Ct have
adopted the Rule under the Jo of Ann. as a Rule
of y Common Law.

This action lies for a Breach of Trust by a
Bailee in a great variety of Instances,
2 La Ray 909. Esp 618. "Bailee" "how"

It lies vs bailees on y ground of negligence, in
all cases of Bailement, when y property is injured
for want of that degree of care, wh y Law requires
of y Bailee, and wh he himself stipulated to use.

When y action charges the Bailee with neglect,
it is founded on Tort, but when it merely states
y contract Express or Implied, and charges a breach
of y Contract, it is founded on Contract. Bailor
has generally his choice wh course to pursue.
3 East 62. 4 Co 83. Talk 26. Esp 618. 2 La Ray 909.

This action lies vs y owners or masters of a vessel
for goods lost or injured, thro y master's neglect.
The Liability of y Master is an Exempt case,
allowed for general convenience, for y owners are
sometimes in another country.

Generally a Servant is not liable for mere neglect in his master's business. Talk 440. Esp 623.

It is said yt y owners if sued, must all be joined as Defs, and yt y action will ^{not} lie vs one, or a part of ym only. for it is said that y right of action is quasi "Ex contractu" Talk 440. 3 ibid 203

But this Rule is too general, y true one is, yt where y action vs y owners sounds in Tort & alleges negligence, all need not be joined, Secus if it sounds in Contract. Torts are several. Contracts are Joint. 5 TR. 649 57 3 East 6270

For any damages occasioned by a neglect of duty, or misconduct of a Postmaster, he is liable to y party injured, i.e. he is liable for his own actual faults and defaults.

So are the Under Servants liable in y same way.

But the Postmaster ant liable for any misconduct of his subordinate Deputies injurious to another, tho y General Rule as to Masters is Secus. 3 Mills 443. Corp 765 754. Talk 17. Esp 624.

Formerly it was supposed that the Postmaster was liable in such cases. But he ant a Com-
Carrier. There is no contract between ym and y party depositing a letter. He is an officer of Government, and liable like other Public officers. He is answerable to the public only - same as y Secretary of State, and if he selects improper officers he may be removed.

Inkeepers are liable in *q. action* for all property belonging to their guest, wh is lost or destroyed, by the misconduct or neglect of the Innkeeper, or lost for want of y degree of care, wh y Law requires of such persons. 8 Co 32. Bull 73. 3 Bb. 626. 165.6
Jones 33. *via Bail* "Inkeepers"

The Liability of an Innkeeper for y property of his guest, is substantially *q. of y Bailee*, & when chargeable for y loss he is regarded as Bailee.

For any deceit in y sale of property, to y injury of y vendee, y action lies vs vendor.

It lies also for a false warranty, or affirmation of soundness. And in case of an Express Warranty, y warrantor is liable, tho he was not guilty of any fraud on his part.

If however he is guilty of y fraud in making y Warranty, &c he may also be sued in action for y fraud. 2 Bb 29. Salk. 211. Yelv. 20. Cro. J. 4.

Whether this action lies for a fraudulent affirmation respecting Real Property sold, y opinions are all not agreed. It seems however that by the C Law, such action will not lie, as vendee must take y necessary Coverts. Co Litt 324. a. n.

1 Combl 366. Cruise Dig. 38. 3 Baines 193 2 Lay 128.

J. J. Minter says it ought to lie in a new country like ours. For his opinion on this subject see "Covenant Broken"

Where y vendor makes an Express Warranty, without any stipulations, and y warranty is false at y time of making it, y vendee may support an action on the Warranty, without either returning y property, or giving the Warrantor notice of y defect, as Sale of a horse warranted sound. &c. &c. for y warranty being false, when made, is broken "eo instante" yt it is made. Of course nothing is necessary to consummate vendor's right of action. 1 HL Bl. 17. 2 YR. 745. Co. D. 13(39) 2 Ch. Bl. 101. n.

But when y Warranty is accompanied with a Collateral stipulation, yt in case y property prove unsound, y vendor shall take back y property and refund y price paid, y vendee hasn't any right to sue, till he has returned y property, and given notice yt it is unsound, for y terms of y contract make this act necessary on y part of y vendee. 2 YR. 745. 1 Camp 174. n. 2 HL Bl. 573.

The Returning of y property in y last case rescinded y contract. But in y former, y vendee by suing on y absolute warranty, affirms y contract. In y former case, y property still belonged to y vendee, and he recovers damages merely on the Warranty.

But in y last case, y property ceases to be y vendee's from y time of y Return, and y price paid then becomes money had and received by vendor. to the use of the vendee. Of course he may maintain "indebitatus assumpsit". See where y contract is not rescinded, tho' he may sue on the Warranty. 1 YR. 133.6 Coups 518. Long. 23. 7 YR. 181. 5 East 449. 7. ibid 274. Com C 38.

When y contract is not rescinded, i.e. when it can't be. or at least is not rescinded by a return of y Property, y action for damages, l may be brot. on the Warranty, or Special Agreement. And in case of fraud upon y fraud, 1 Selw 112. 691.2. Etb 42. 4 Maf 135. 7 East 274. Cou p 818. Doug 24

And If goods are merely warranted sound witht any Express agreement for rescinding the Sale, in any event, y vendor has his choice of 2 remedies.

First on the Warranty.

Second. he may return y property, witht vendor's consent, and sue in assumpsit for y price paid. This last is a very recent doctrine.
3 Esp 83. 1 Selw. 688. n. 9—

Formerly held that the vendee can't rescind. The Rule proceeds upon y same principle as y Warranty in a policy of Insurance. The truth of the Warranty is a condition precedent to his right to retain y money and the acquisition of one right under y Contract.

But when y vendor returns y property, as soon as y unsoundness is discovered, i.e. as soon post as it can be conveniently done, he can't be allowed to return ^{the} all, but must seek his remedy on the Warranty. As in sale of a house if vendee after discovering the house is unsound, works him, or tries to cure him. Contract is rescinded.
1 T R 136. 4 East 449. 7 Q R. 244. 74. 1 N R. 260.3.
Etb 82. 4 Esp 35. 2 Ch. R. 101. n. 5. 7 East 274

The Law as to the sale of Personal property has been much altered of late, but it has been done advisedly.

The action lies for a false & fraudulent affirmationⁿ concerning goods. An affirmation is no contract to^{the} a Warranty - it is a mere declaration. As Vendor affirms an article to be sound, knowing it to be unsound.

But it lies not for a false affirmation, if y vendee himself is guilty of any folly, or neglect in confiding in that affirmation, if by using ordinary care ^{he} it might have been ascertained y falsity of it. As J. G. falsely asserts y a watch gives 100 Dole.

So where y defect is visible to common observⁿ. y lies not. As a horse has but one eye, and is warranted sound - So if he has but 3 legs. *Id Ray. 629. 630. 1118. Esp 629. 30. 1 Lenth 110. 1 Salk 24.*

A sells a horse to B, having but one eye, without a General Warranty of soundness. Def pleaded ~~by~~ to the action. Verdict for the Plt. held he was entitled to Indgmt.

This was somehow qualified by J. G.

With regard to Warranties, a general warranty will not bind vendor, in case of visible defects. But Gould thinks, a Special Warranty will bind him tho y defects are visible.

As A sells to B. a horse, whose ancles are covered with visible ringbones, warranting him sound, he is not liable. But if he make a Special Warranty, as y^t y ringbones shall not injure

his travelling, he will be liable.

But if y defect is one, wh must necessarily injure him. vendor ant liable on his Special Warranty. & G loss of a leg.

This action lies for artfully disguising defects in goods. for y is a fraud upon the vendee.

But the vendee may declare for y ^{fraud} period itself, stating that disguise, or he may declare on an Implied Warranty, for tis held wilfully disguising known defects, is itself an implied Warranty. 2 Role R 5. Pea Eri 229. Esp 629. 32. Pea, 100.

Formerly held in Count, yt if one without fraud or science sells personal property for a sound price. the Law will imply a warranty, yt y property is sound. in y vendee expressly assumes y risk of its being sound. 2 Root 407. 2 Gro 220. 160.

The Rule of C Law is directly y reverse. If there be no fraud. & no Warranty, y maxim 'Caveat Emptor' applies. 2 YR 757. Pea 110. 23. 1 Pow C. 142. 2 East 314. 1 John. 274. 2 ibid 179.

Exception at C Law to this Maxim in case of provisions. There is an implied warranty in such case. that they are sound. 3 Bl 166.

1 Ton M. 110.

The vendee of warranted goods does not by selling y goods lose his right of action vs y vendor even tho sold for a sound price. The right of action was complete when y warranty was broken. The Sale of the subject don't oust y rights 7 Y R. 148. 1 H. Bl. 17.

Decided in A York, yt if A sells goods to B with warranty of Title, and B sells y same goods to C with like warranty. B if sued on his warranty may cite in id C his warrantor to appear and defend his suit, and if he don't appear, and defend, y record in that suit is conclusive in y suit by B. vs A. 1 John. 37.

This is y Rule at C Law. in y case of Real Property. See Quere as to y propriety of extending it to Personal Property?

If y vendor practices any fraud by a false affirm^t respecting his Title to y goods, y action lies, & it is said that science on y part of y vendor, is necessary to subject him, & he must have have known it to be false, because he is liable only on the ground of fraud, an affirmative being no contract. Bul 30. Co. 629. 32. Carth. 30. 3 Y R 57. 1 John. 129. 2 East 448. Talk 200.

Still

Title however when a personal chattel is sold y very sale implies a warranty of Title in y vendor, tho y Sale is expressly intended to be a bargain of hazard. 1. But the vendee shall assume y risk. 1 Lenth. 22. 373. Com. & J. 4 3. Roberts & Co. 523. 200 L. 174. 1 John. 374. 1 Role 90.

This Rule is well settled, y act of selling implies yt what I sell, is already mine.

Now y true rule is, yt if y action is brot upon y false affirmation, treating as a fraud venies in y Def. is indispensable. Otherwise there is no fraud. But tho y Vendor had no knowledge, & y vendee can recover on y Implied warranty, No need in y action of proving y false affirmation tho it is always advisable as yt fact will tend to show yt vendee was not to take y risk.

If goods are sold by a Bill of sale, there can be no Implied Warranty, of soundness, even tho y Vendor intentionally concealed y defect, y Bill of sale is a deed, and y whole contract is supposed to be in y deed, so yt a parol stipulation can't be annexed to the deed, it being of too solemn a nature, vendee may sue for fraud, 1 Barn. 583.

And y Law will not only not imply a warranty in such a case, but even if there is an Express parol warranty, it will not support an action on the warranty. So parol qualification can be annexed to a deed. 1 Barn 44. Cro 248.

But if y vendee is induced by fraudulent representations to dispense with a warranty and assume y risk, as to y quality of y goods, he may sustain an action on y fraudulent representation - As A in selling a horse to B. says, "I will not warrant y horse, but will give you my word of honour, he is sound"

But if you take him at all, you must take him as he is, for I don't practice making warranties, and at y same time, knows y nose unsworn, y bendon. A. is liable for y fraud. 6 John. 112. Is held in Connt.

This action lies for injuries occasioned by false and fraudulent affirmation in y sale of prop^{ty}. This y party making ym has no Interest in y Sale, as A falsely recommends y goods of B. This action lies on it at y Suit of y party injured.

But to have y effect, y affirmation must have been been both false and fraudulent. Maxim, y damage wthout fraud, or fraud wthout damage won't support y action.

Formerly in cases like this, y action w^{ld} not lie. It will now. The first action on y subject is. 3 H.L. 57. see 1. East 318. 2 Do 12. 12 ibid 632. 8 Do 225. 3 B. et C. 307. 3 John 27. 5 ibid 81. 8 ibid 28.

It lies wth A for falsely and fraudulently recommending B as worthy of credit, when he was not in favour of y Party injured by the recommendation. 3 H.L. 57. first case on this subject

But it is material y A in y case supposed sh^d have acted fraudulently, for if he really believed B. worthy of credit, or a man of property, he is not guilty of a fraud, and no one is liable for giving his mere opinion respecting his reputation, circumstances, if he act honestly.

It lies for common cheating, as playing and
winning money with false dice Cro P. & Ch. 90.
Esp 639. Bul 32.

So. of one personates another, and does an act,
wh^{ch} wd subject y latter, y former is liable in y
action. Cro P 90. Esp 660. Bul 32.

It is settled y^t when an action is br^ot to recover
y price of goods sold either on a "Quantum ^{merit} Salebat"
or on an Express agreement, to pay a stipulated
price, y Def may reduce y price claimed by
showing defects in y goods, or labour done.
This might always have been done in y former
case, but not when there was an agreement to pay
a certain price. 10 Mod 43. 5 Rep 483. 1 Yel 947. Esp 660

Formerly when there was an agreement to pay a
fixed sum, y vendee must pay that sum, at all
events, and was driven to his cross action in
y Proman^t, or fraud for y defects in y goods.
This Rule is of modern origin. 8 John 453.
Esp R 43. 4 idia 90. 2 Lea Pri 233. 7 East 494.
Feltw 69.

Further if def does not insert^{int} on y claim (under
y modern rule) by showing y defects in y goods,
he but permits a recovery to y full amount
charged, he must bear y loss. He can't afterwards
maintain y Cross action, as he might formerly,
for y defects. 3e 1 Camb. 106. 8 John 453.

If D. by a wrongful act make an innocent
person liable over to a 3^d. he is liable to such
innocent person to y amt of y injury sustained.
As a lion, B's cattle into E's garden, where

They are distressed damage Feasant. A is
liable to D. Rob & Cons 525. On Ch 325. Carth 3.4
1 Role 100.1.

If my servant does an act by my command,
wh he supposes I have a right to command,
when in fact I have not, and he is subjected
to y party, I'm liable over to him.

As I agree to indemnify a Thff for serving
property on an Exr or D.P. supposing it to belong
to him, when in fact tis y property of B,
and the Thff is subjected, as he may be,
I'm liable liable on my covenant of Indemnity

So if there was no no Express contract of
Indemnity, If I direct him to serve such goods
on my Exr. I'm ^{fully} liable over to y Thff.
1 Cow 177.8. Robt 53.

Whenever a public right is obstructed or violated
to y injury of an individual, he may maintain
this action to the wrongdoer, but in such case,
he must show special damages, for no individual
can have an action for the violation of a public
right as such.

As the inhabitants of a certain place, have a
right to pass a ferry toll free, and ferryman
refuses to carry one toll free, y individual
injured may have this action stating special
damages. De 1. Talk. 12. 5 Co 72.3. Carth 193. 51 100

As suppose a public nuisance wh occasional
inwardal damage, y party injured may have
y action. As obstruction in y highway or over
a bridge - &c

But in y^e case of y^e party injured might by ordinary care, have avoided y^e injury, he can't have y^e action - w^h hole dug by the side of y^e road, leaving room saty to pass. He with care, and a person get into it ⁱⁿ y^e daytime. See also y^e night Season. Earth 104. 11 East 60. Bull 20 contra.

Once held y^t if he fell in in y^e daytime, y^e person making y^e hole, he wd be liable. Not Law however.

It lies for any injury occasioned by any nuisance, as by obstructing ancient lights. 3 Co 58. 3 BB 216. 1 Vent 239.

Formerly held y^t y^e enjoyment of these ancient lights, must have been immemorial. But now holden, y^t y^e long enjoyment, tho' not immemorial, as for 20 yrs. warrant y^e Jury in presuming a grant, or any thing necessary to convey y^e knowledge. Esp 656. 2 Tauna 276. a. B. n. 1. P. et B. 400. 11 East 372. 3 Conn. 259. 8.

But y^e enjoyment of such lights as a Tenant of y^e adjacent adjoining land, will not conclude y^e Land Lord. & w^hnt Ev^{ts} y^t he knew of such lights, were erected. 11 East 372.

As G. B. Gould can't see how y^e Landlord, knowledge of y^e existence of y^e lights, shd make any difference, for y^e land is not in his possⁿ. & he can't enter.

G. B. is unable to see how far this right is asserted in this country or in Eng. at present.
Where did it mean projected lights?

55

If a man having built a house on his own land, sells it, neither he, nor any one claiming under him, can at any time, (however short) erect a building so as to obstruct y light of y building. The land contiguous to it must even remain open, because by building so as to obstruct y light (it is said) impair y grant. 1 Lev 122. 1 Vent 239. 37. Eob 636.

This is a very strange doctrine, at least I very doubt, whether it wd be considered as Law. The vendee, if he apprehended any such inconvenience, shd make it a matter of contract.

The obstruction of a mere prospect however valuable, however valuable in the estimation of y owner, is not actionable. 9 Co. 38. 3. Pl. 27. Eob 636.

But a house on y line of y street, (public) is on y street side immediately entitled to all y privileges of an ancient mansion according to y first rule. It matters not even if y street commissioners shd sell y land, to a private individual. If y owner of y soil in front raises any obstruction, it is a nuisance. This is a very reasonable Rule. 3 Wils 466. 2 Pl. 12. 364. Eob 636.

The recovery of damages for a nuisance is no bar to an action, for any subsequent damage, occasioned by the same nuisance. The 2 recoveries are not for y same cause. He sues for distinct damages in y 2^d action. Every continuance of a nuisance is a continued wrong. Bro E 131. 2 Leon. 103. Eob 637.

The original author of a nuisance can't discharge himself from subsequent liability, by selling, leasing, or assigning the nuisance, and y land on wh it is erected: for he does an illegal act, is forever liable for all y consequences of such act. But y vendee is also liable for any damage occasioned after the sale. &c for he continues the nuisance. Cro J. 373. 500. Eo 637.

This action lies for obstructing ancient lights both in favour of Lessor and a Lessee. for it is an injury to present poss^r. and also by inheritance. 4 Burr 2040. Cro C. 237. or 325. 1. East 372. Eo. 635. 7.

Overhanging Pltfs houses, so as to cast y water upon it when it rains, or upon the Land to y injury of ym. is an action for wh y^s action lies. Cuius est Solum eius est usque ad Coelum. There must be Special damage to render it actionable. 3 Bb 216. 1 Rolle 107. 5 Co. 101. 1 Str 634. Eo 637. y oulde think, care overhanging will support y action or an action -

So if one so places a spout under y eaves of his house, so as to cast water ut ante, it is actionable, tho it don't overhang. Str 634.

The action lies for obstructing a private right of way. This indeed is not a Nuisance, but a disturbance. Cro E 84. 466. Cro J. 170. Eo 639. 40.

A right of way over another's land may be presumed from long and uninterrupted use or usage. - as if ^{it} has for 20 yrs. In Eng. or 10 in Connt) passed over B's land without permission and without interruption, it is conclusive Eo

of a right of way, and it is not necessary, yet I think
 I should believe, yet such grant was in point of
 fact, ever made. They are warranted in
 finding it as a presumption of Law. The
 Rule is founded on principles of public policy.
 to discountenance stale and dormant claims.
 Bul 74. Str 909. Es 640. 11 East 372.

And in favour of a Public, a right of public
 way has been presumed by the Ct of B R. from
 an use of only of 6 yrs. standing 11 East 375. n.
 1 Camp 260. Where on what principle? It does not
 appear, yet case is not reported fully.

The action lies for diverting an ancient
 watercourse from Plff's land, to his mill,
 to his injury. 1 Mil 174. 4 Co 84. 1 Str 5. 6 East
 208. 2 Court R 93. 584. 1 Root 535.

But a right adverse to ye original and natural
 right of the Plff. may be acquired by 20 yrs.
 In Eng. and 15 in Court, uninterrupted and adverse
 use of the stream. As if a Proprietor above
 divert. a part or even the whole of the stream
 from the Proprietor below, for ye length of time.
 ye Ct will presume a grant. 6 East 206. 1 Bat P. 406.
 1 Camp. 463. 15 John 241. 15 John 213. 8 May 136. 1 Con L
 382. 2 Wia 584. Root 535. 5 East 208. is an
 instructive case. Title Estate in Land &c &c.

This last Rule supposes a proprietor above to have
 diverted the watercourse from the proprietor at below.
 and ye latter has acquiesced in such diversion
 for ye period of time, for if he has contested
 a point, a former acquires no such right.

This action lies for injuries affecting the rights of persons standing in the relation of Master and Servant. Par. Child. Master and Servant - and growing out of those relations, for which see those Titles & Bull 78. Cro. J. 501. 38.

For actions by Slave. see 3 Will. 18. 3 Burr. 1878. 2 T.R. 100. 7. Ex Ray 1032. 2 Car 387.

For actions by Parents: see 2 Landa. 169. Coups 54. 2 Bl R 387. 3. B. 345.

For actions by Master.

The action lies for a violation of any Legal franchise - As right of voting at an election. The violation of the right is remediable in this action. If a Legal voter tenders a vote & y President or presiding officer rejects it. he is liable in y action and y damages in such case are purely presumptive. Galk 10. 3 And 17. Esp 647.

On y same principle, a candidate for an election, if rejected, may have this action in y returning officer. If, if y latter, refuses to take, count or return of the votes, for y former. 2 Vent 25. 1 Bern 200. 2 Lev. 50. 3 T.R. 26. 32. Esp. 646.

And such officer is liable in y action for making a false return prejudicial to the Candidate - 11 Co 93. Esp 647.

The wrong consists in y violation of his Franchise. But in case of a false return, it has been decided y a civil action will not lie, in favour of y Candidate vs y returning officer, in y right to the seat has been decided by the Parliament in favour of y Candidate during, or unless y question can not be determined, by reason of its dissolution. Galk 200. 5. Mod. 45. 8.

But y^e doctrine has been very correctly denied
by La Caden. Parliamt undoubtedly have a
right to decide, who shall be entitled to a seat
in their body, but I. G. Miller y^e fact can't
be admitted in Civ.

To deprive one of an action on these grounds
wd be to deprive him of trial by Jury.

The action lies at C Law for y^e invasion of
y^e right of literary property, and an author
may have y^e action vs any one, who publishes
his Manuscript works. 4. Burr. 2303.

Now this right is secured to y^e author by certain
stat regulations both here, and in Eng.

This right is secured to him in y^e first instance;
for 14 yrs, and then if he survives that period,
y^e right may be secured to him, and his
Representatives, for another term of 14 yrs. & then y^e right
becomes public. vide Laws of Congress. Title
Copyright Right.

Upon a similar principle, y^e action lies for y^e violation
of a Patent right in favour of y^e Patentee.
Laws of U. S. Title "Improvement"

This action lies for injuries committed by one
person, while in y^e employment of another vs y^e latter.

As if an Agent in conducting y^e master's business
injuries another by reason of his negligence, or
want of Skill, y^e master is liable.

But if the Servant sha wantonly, and wilfully injured
another, y^e master wd not be liable. In this
case y^e master is liable on the ground of negligence,
in not providing faithful servants, so wd he be

he is an Insurer, but he is not an Insurer
vs y effects of his evil passions. La Ray 739. Talk
441. La 1383. Ep 50 Master and Servant.

This action lies for an obstruction of Legal process.
present If D. resist the Shff. or by imprisoning him,
him from arresting B. on process, in favour of A.
and y debtor eventually is not arrested, ~~to~~
A may have this action vs D. Co E. 238. 5 Co 93.

Case in New Haven County, Shff held an Ex-
ecution in favour of B. Seeing the Shff going
towards y house of A. knowing his business,
ran into his house, and without A's knowledge
battered his door, and thus prevented an arrest.
Held that C was liable in this case to this
action to y Plff in the Process.

No Special action on the case admits of any
process. precise form of declaring, as there is in
formed actions. By formed actions, is meant
all actions known to the Law - as Debt.
Replevin. Trespass Quare Clausum fregit.
y forms of wch are preserved in the Register.
But there can be no precise form to actions
on the case, because they are indefinitely
various in their natures & circumstances.
1 LR 541. Gib R. 192.

Replevin

61

^{1st} Replevin of Cattle taken
 Damage Tenant 68 ^{2^d} Personal
 property seized under process of
 attachment 74. Redding 78.78

Replevin.

This has been defined to be y delivery to y owner by legal process, of his cattle, or goods when distrained for any cause upon his giving security to try y right of distress, and to redeliver y goods, if y right is decided against him. Co Lit 145. Et 346. 4 Bac 372.

According to y above definition, y action is confined to cases of distress, but in point of fact, it lies in many other cases. Vide Infra.

This action is y only means by wh property so taken, can be specifically restored to y owner.

A distress is y taking of a Personal Chattel out of y possⁿ of y wrongdoer, or party in default into y custody of y party injured to be held by y latter, till compensation is made for y injury. It follows then, yt a distress is not an action.

The Term Distress is said to signify either y act of taking y goods, or y goods taken - 3 B & 5.

According to y above definition, and y subsequent opinion. This action will not lie for goods taken for a mere trespassing act but for such only as have been taken y by distress.

Hence if a wrongfully take y goods of B B cant have y action to recover the Specific good themselves. tho he may have an action to recover damages. Miles 572. s

But according to other opinions, y^e action lies to recover y^e possⁿ of goods, y^e have in any way, been wrongfully taken out of y^e possⁿ of y^e owner. This last seems to be y^e only rational rule, for there are many things, y^e value of wh^{ch} is merely ideal. As Family Pictures. In such cases, y^e damages awarded by a Jury may be merely nominal. I yet y^e owner may consider them as above value and this Detour wd lie in such cases, yet y^e remedy wd be precarious, y^e Indgmt being in y^e alternative. 7. John. 140. Bull 32. Com 2. Repl^d 2. Cro E 824. Tcho & Leboy. 387. 2 Selw. 698. n

The writ is granted only upon security given by the Plt^f in y^e action to try y^e right under wh^{ch} y^e goods are taken, & to receive y^e goods provided y^e right is decided vs him. 3 Bl 13. 147. Co Lit 140. Eo 547. f

In y^e action under y^e Count Law, y^e Plt^f gives security to try y^e right of y^e distribution, &c and also to answer all damages, if y^e right is directed vs him, but not to restore y^e goods themselves. This is never denied. There is no specific restoration by Plt^f for the security. I. y^e bond is regarded as a Substitute for y^e goods. I think y^e mode prescribed by this Statute, preferable to the Eng C Law. rule, and in modern times there are several Eng Ct making similar provisions.

By the C Law if y^e Plt^f does not ^{try} y^e right, or fail in y^e action, a Indgmt 'de retorno habent' is awarded & y^e goods be restored to y^e Plt^f. and then he is entitled to hold y^e title. The satisfaction is made. But at C Law he can

do nothing more, yⁿ y^s. He may not sell
y^m. Co Litt 145. & Co 147. a. 3 Bb 147. 58.

Tender of sufficient amends. before distress made
renders y^e distress unlawful. Hence if after Tender
he distresses, he is liable in Trespass for y^e taking—
for y^e only object of y^e distress is to obtain security
for some debt, or duty, or satisfaction for some
damage sustained by the Distreiner.

So if after distress actually made, but before
impounding, y^e owner of y^e goods tender satis-
amends, a subsequent detention of y^e goods is
unlawful. Secus if y^e Tender is not until
after impounding, for y^e goods are then in y^e
custody of the Law. Bul 60. & Co 147. a.

So if after Judgment for distreiner in this action,
he is tendered sufficient amends, and still
retains y^e goods, his subsequent detention is unlawful,
and Plff may have Detinue, or Trover for y^m.
Esb 357. & Co 76. a. 2 Role 581.

If y^e original distress is unlawful, as where made
after Tender of sufficient amends, trespass will
lie vs Distreiner; But where y^e original distress
is lawful, and merely y^e subsequent detention
unlawful, Trespass lies not, tho' Trover or
Detinue does.

Where a distress is taken, it is at C Law in all cases. It be impounded, Animals in a pound overt— inanimate chattels, as goods in a pound covert. The Distreiner may not at C Law, retain ym in his possession 3 Pl. 12. Co Litt 4th.

In Count we have a pound overt, but no pound covert. Here animals are impounded in a pound overt, but inanimate chattels remain in y possession of y distreiner, till y right is decided.

At C Law, a distress being in y nature of a Pledge, or security can't be sold by the distreiner. He can only keep it as a means of compelling y owner to pay the debt. 1 Burr 388. 3. Pl. 13. 13.

So too by C Law if animals are distrained, damage Tenant, y distreiner can't sell ym. He can only hold ym in pound, till satisfaction is made.

Secur under our Law, here they are to be sold.

So in Eng. now by several Acts, y distreiner is in most cases, empowered to sell y goods distrained. But even now cattle taken damage Tenant, can't be sold by the distreiner. He can only keep ym impounded, till satisfaction made. 3 Pl. 13. 6.

There were however some cases at C Law, in wh a distress might be sold. see Co 41. 12 Mod 330.

Whenever there is a distress taken, a Replevin writ is demandable, as a matter of right upon furnishing the necessary pledge. The Ct can exercise no discretion in issuing the writ. It is "strict Duri".

And if one grants ^{a Lease} with a clause of a right of distress irrevocable, replevin lies notwithstanding the clause. It is opposed to good policy, for in this way the Land Lord might practice great injustice. Co Litt 145 + Bac 373.

The Principal cases in which distress may be taken at C Law. are two.

- I. Where cattle are taken Damage Feasant.
- II. For nonpayment of Rent due.

In the last case under the 5th y distress may be sold. 3 Bl 67. Co Litt 46. Ep 350-54.

There are certain other cases, in which a person may distress, but they are almost all distresses for the enforcement of some feudal duties.

In Court distresses for the second cause are not in use, and the Non Use (I & conceives) may be considered as void at C Law is so. 18. y such a distress can't be had in Court.

In Eng the writ of Replevin may issue out of Chy. or (by an ancient Ct) it may be issued by the Shff. and even by the Shff. verbal order to his Bailiff to replevy, is sufficient in Eng. Ep 346-7. Tho not so in Court.

By the C Law the writ lies in all cases of distress, in which the distress is founded on a "Capias in Mithernam".

In Count the writ may issue by It in all cases, in wh cattle or goods are impounded, distrained, attached or ^{seized} ~~seized~~ in when seized in C^o. or on an warrant for fines or rates, or upon some cause tried in y maritime It.

But it seems according to the practical construction given to the It. y cases not accepted under it are only 2. viz cattle taken Trespass, and property taken under a writ of attachment.

I Replevin of Cattle taken damage Tenant.

In y^e case y owner of y Land has his Election, either to bring an action of Trespass vs y Owner, or to distress or impound the Cattle.

If however he does distress, and y cattle escape thro his own fault or neglect, his remedy is forever gone, and he can't afterwards sustain Trespass, but having once made his Election, he must abide by it. And this Rule is general in cases of Election.

But if y cattle escape w^out his fault, as by reason of the Insufficiency of the pound, death, rescue, he may still have Trespass, vs the Owner: for in the last case he don't voluntarily abandon his elected remedy. See vs J. they die by his fault. 12 Mod 508. 63. Ed Ray 420. Faltk 248. 5 Bac 179

Strong analogy between taking y body of a Distressor debtor in C^o and distressing of cattle damage Tenant. The body in y one case, and y body in y other are regarded only as Security for y debt, & in both cases so long as the pledge.

is retained, there can be no other remedy—
12 Mod. 663. 5 Bac 176.

Where y cattle are imbound, and notice thereof given to y owner, it^{is} his duty to see that they are fed. Hence if after notice, they shd die for want of sustenance, it is his loss, and not the distrainer. *Secur* if they die before notice.

By the C Law ~~where~~ y owner of cattle distrained must support ym. in they are put into a pound Covert. 3 Pl. 13. Co Litt 47

And by Count It y owner must either redeem or replevy within 24 hours after notice, or he incurs a forfeiture of 17 ct. per head for every days neglect. besides the Expence of keeping and these forfeitures are applied to satisfy y damages done, and the Expence of Pannage. If they exceed the amt of damages &c. y Surplus is to be divided between the town treasury and the Pound keeper.

When y owner replevys the cattle distrained, damage Feasant, and Indgmt is rendered for Distress at C Law, a judgment "de torno habendo" is awarded.

In Count. if the Def in Replevin prevails, he recovers a sum in damages for y payment of wh. both he and his pledgers are liable, but there is no restitution of y goods as in Eng. If he don't satisfy the Indgmt, a *Sci Fac* may issue vs his pledgers.

If y Plt in Replevin is taken in C^or^t. and escapes or even dies in prison, his Sureties are still liable on the Recognizance. They are not discharged by his death.

By our Law where y owner of cattle distrained damage Tenant. is unknown distrainor must give notice.

Where one persons cattle enter upon y land of another, it don't necessarily follow, yt they are liable to be distrained, or y owner of ym to Trespass for damages. To make him or ym so liable, y act of entering must have ~~be~~ amounted to a Trespass. Hence if B's cattle enter on A's land, thro' y insufficiency of A's fence. B ant liable.

So if part of A's fence is ⁱⁿ sufficient, and y cattle pass thro' y insufficient part, B is not liable. Secus if they pass thro' y part wh is satis.

If y cattle of A enter by the Highway upon y land of B. it is immaterial at C^o Law an A's fence was or wasnt sufficient. for at C^o Law it is unlawful to permit cattle to go at large on the Highway. 2 H Bb 327.

This Rule needs some qualification, for it is if A is driving his cattle on the Highway

and they enter upon B's land. Tho' y insufficiency of B's fence. B (y owner of y field) has no remedy. Seem if they go at large on the Highway with a driver.

The principle on wh y owner of cattle is liable of course for all Trespasses committed by ym. is y.

That for mischief done by animals from a disposition common to the whole species, he is liable with notice of ym. After having done so before, and yet for an injury committed by an animal from a disposition not common to y species, y owner is not liable with previous notice of his having done so before. As. A has a dog wh kills an Ox of B. A is not liable with notice yt y dog was addicted to it before. La Ray. 606. 2 Bp. 601.

When an animal is distrained damage Feasant, y distrainer is not permitted to use y animal, and if he does, he becomes a Trespasser "ab initio" As. A takes B's Ox by a distress, and he works him, y user amounts to a conversion, and in deed it constitutes him a Trespasser "ab initio", for where one person takes possession of property of another, by licence of Law, any subsequent abuse of that Licence, makes him a Trespasser, "ab initio" 3 Bp. 13. Cro J. 148.

As the Title to land may incidentally come in question in y action of Replevin, some have called it a Real action in such cases. But y is very incorrect - It is strictly a personal action as much so as a debt.

No action can properly be called a Real action, unless the Freehold may be recovered, wh can't

be done in Replevin. Comb. 27. 42. P. 4 Bac
473.

It is a Rule of the C Law. (founded on reasons
of policy) yt all distresses must be taken in y
daytime, ni in y case of cattle damage Tenant.
This exception is allowed, it is said, because
y beasts might escape off y land before day.
Where ant it allowed to prevent further
damage. F. Co Litt 142. b1. 3 Bl 11. Ep 36.

A distress of cattle damage Tenant must be taken
while y beasts are on y land, during y time he
has a Lien on ym, but no longer, i.e. so long
as they are upon his land, he has a right to
seize, and hold ym till satisfaction for y
injury.

The Rule was formerly y same as to distress
for Rent. i.e. y party entitled ed distress on
y land, but not elsewhere. This however is
now remedied by an Eng St. 9 Co 22.
3 Bl 11. Co Litt 142. Ep 360.

In case of Rent arrears, a Landlord might
at C Law. distress to any amt. This rule being
considered a grievance, is now altered by the
St of Marlbridge 5.2 Hen. 3.

By this St y Landlord is forbidden to take
an Excessive, (i.e. enormous altogether disproportioned)
distress, and if he does, he is liable to an
action on the case. As if he distresses 2 oxen
for 12. pence.

If there were other distresses nearer y value,
he might have distrained. 3 Lev 48. 3 Bl 12.
For 552. 1 bent 104.

But for an excessive distress, trespass will not lie. Case is y only remedy, except where y property taken is gold, or Silver, corn, or has a certain and known value, in this case it seems. Trespass will lie, for as to any thing more y n y amt due, he is a wrongdoer. *Tab intro* 12 Bur 590.

A distress for Rent arises at Law incident of common right in those cases only, in which y owner of the Rent has also y Reversion of y Land. Where he has no reversionary interest, he cannot distress as of common right, i.e. the Law does not confer any such right upon him. Of course he cannot distress in by virtue of such a clause for distress in y grant. *De. de Grant of y whole Interest, reserving Rent. 1st with and 2^d with a clause of distress. Lit J. 215. 18. 2 Litt 142. 3. 2 Bb 42. Est J 550.*

Now by St 4 Geo 2^d y right to distress for Rent. arises is extended to all rents, whatever, as well as to cases, where y Party entitled has not, as where he has a reversionary Interest. *2 Bb. 43. 3 And 0. Est 350. 6.*

In some cases the Indignum *Ubi reditio habenda* is taken away in Eng by St Law. and a recovery in damages substituted.

By St 11 Ch. 3^d. if Def in y action prevails, he recovers Costs and damages, so much as y property distrained is worth, provided y property is less in amt (i.e. in value) y n y amt of Rent due. He may afterwards take a second distress, or bring another action for the Rent.

If of equal value or greater, Def. recovers under *yo*
 It *y* whole amt of Rent due, together with, cost,
 but he can recover no more. 3 J.R. 140. 149
 2 H 36. 30. 3 36 100. 2 H 116.

II Personal Property seized under process of attachment.

By the Law of Count *y* property

When Replevin is brought in these cases, it is never
 an adversary suit. The Plff claims no damages.
 It is merely a means of restoring *y* possession of the
 goods to the Plff in the process.

This Species of Replevin is called a Mandating
 precept requiring the Shff. or other officer who
 attached *y* goods, to deliver *ym* to the Def.
 in the process in Security. At Inst. that he and
 his Sureties write answer.

The security given is substantially that the Plff
 in the process of attachment prevails, Def in *yt*
 process will answer all such damages, dues and
 demands as shall be recovered *vs* him. So *yt*
y Replevin is merely a Security for damages
 in the attachment.

The writ of Replevin must in this case be directed to y same officer, who seized y goods on y attachment requiring him to redeliver and to give notice to the adverse Party.

The Writ must also be returnable to the same Ct. to wh y Writ of Attachment is returnable.

This writ of attachment then becomes a file of y same Ct. and the Bond or recognizance with y Pledges upon it, is to be entered in the File of the same Ct.

The bond must be taken in favour of the adverse Party, i.e. Def in Replevin. Otherwise there be no security to him, as he c'd not sue upon it.

In Modern Practice, y Writ of Replevin in such cases is in a great measure superseded by the practice of receiving goods attached on Mesne Process. When an officer attaches goods on Mesne Process, it has been customary to deliver ym. to the Def. on his procuring a Responsible Receiptsman. This y officer is warranted in doing.

It has been decided, that y magistrate in taking bond, on the Writ of Replevin, act, ministerially, and if he takes pledges, wh are insufficient at y same time, he is liable to the Def. in the first process. *proceda the Magistrate is not Justified* Bull 11 81 R 28. 1 HBl 75. 2 G. 35. 869 348.

If the pledges were reasonable at y time, he is not liable, tho they are afterwards Involvent.

It has been questioned, in Pltfs own bond may lawfully be taken by the Magistrate in the writ of Habeas. But it has been decided that such bond cant lawfully be taken by the Magistrate and that if he does take such Bond, he is liable for the Indgmt recovered, if it is not satisfied by Def. Indeed a contrary Rule wd be absurd. Nov 15

It has been holden in this state, yt if y property of A is by mistake seized on attachment in the property of B, yt he, A, cannot bring Habeas. tho he may have Trespass: for it is said yt Habeas on attachment is not an adversary Suit and no one in y Def in the attachment can reclaim y goods attached. Feb 27

See Quere. If Habeas will lie for a Tortious taking. In such case it will lie. See if Habeas lies not for a mere Trespassing act.

If the cattle ^{and} of a feme sole are distrained, and while they remain under distress, she marries, her husb. may sue in Habeas alone, and y Rule goes still further, she may not be joined with him in the writ. For the property is in him & her subject to the Lien of the Distressor. It is a right in prop^y, and not merely in action, consequently it is vested by the marriage absolutely in the husband.

But such a declaration will

be good after distress, because, it is said, it will be presumed, yet they were *De Tenants* of *y* cattle.

Quere as to *y* correctness of this presumption?
Co 375. *Bull* 53. *181. 2.*

If after distress taken, *y* owner of *y* goods, die, his *Co* &c may replevy them. This right is not taken away by death, and as the Property taken is Personalty, *y* right to it, vests in *y* *Co* &c.

If *y* goods or cattle of several persons are taken in one, and the same distress they cannot join in one writ, but each must bring a separate action, for their interests are several. Two or more persons cannot join in one suit in to enforce a *De* right, but there can be no *De* right right, in there is also a *De* Interest. *Co* *Lit* 145. *It*.
Co 374. *Bul* 53.

If goods are distrained in a foreign country, they cannot be replevined in this country, and vice versa. They can be replevined or replevied in *y* country in wh they are distrained: for it is said, *y* distress may have been lawful where it was made. Tho unlawful here. *2* *Shaw* 21.
Co 372.

See *Quere*, as to this reason, may not the *Lex Loci* be enquired of? Undoubtedly.

Is not because *y* causes of *y* action or claim for wh the distress is allowed at *Co* Law. are all Local.

Replevin lies only for things Personal, and not for Chattels Real. Moveable Chattels only are subjects of Replevin.

Hence it has been holden, ^{1st} it lies not for Title deeds, as they are the Muniments of Real Property. ^{2d} *12. 38. 372* *2d* *372*. & *Bac* 385.

The reason is insufficient. Same objection wd ~~lie~~ ^{be} for Trover ^{for} deeds. Same objection wd apply to Trover for Title Deeds. If however it lies only for goods, distrained, then it follows it will not lie in this case, for Title deeds cannot be distrained. But if it lies for a Tortious taking, then, I think, it may be brought for Title Deeds.

This action is said to be founded on a right 12. on the Property or Interest of the Plff. Whereas Trespass is founded on the injury to the Prop^r. Hence tis a good plea in Replevin, if y^r property is in a Stranger, and not in the Plff. This however wd be no Plea, neither in Trespass or Trover.

Proberly is said to be a plea in abatement or in Bar.

See Quere as to its being a Plea in abatement? *2d* *357. 2*. *2d* *32*. *Part* 74. *243*. *Hdk* 94

Pleading^d

The decl^d charges a wrongful taking and detaining of the goods, and also demands damages. *Com* 2. *Plead* 3. *R* 10. *2d* *June* 194. *2*. *320*. *nd* 61. *205*

For y form see 2 Ch Pl. 364.

When there is a trial in Replevin, y Def may either deny the Taking, or justify it in a plea in Avowry. 4 Bac 388

The Taking is denied by the General Issue, "Non Cepit" but under this plea, y def cannot claim a property in the goods, nor give in Evr any fact amounting to Justification. If he will justify, he must do it by Plea. He can't claim property or justify in such case because a Justification is inconsistent with the general Issue: for y one virtually admits, while y other denies the Taking. 1 Vent 249. Bul 54. 1 Salk 8. 2 Lev 92. 6 Mod. 81.

If Def justifies in Replevin for beasts taken, damage feasant, &c he is called the avowant and his Plea an Avowry, provided he justifies in his own right, or in in right of his wife. But if he justifies in right of another, he is said to make Cognizance, and he is called a Cognor. So called from the form and effect of the Pleas 3 Bb 100. 2 Saund 193 Ep 360.

The action of Replevin is as regards y Pleading strictly "in genere". The Avowry has the 2 fold effect of a Plea, and a declⁿ. It is at one and y same time, a plea to the declⁿ in Replevin, and also in y nature of a declⁿ to the plea in Replevin.

So on y other hand, y answer to y avowry

It is in y nature of a Replⁿ. and also of a plea in Bar. Hence y answer is generally called a plea in bar to the avowry.

When a party avows, each party stands in relation of actor or Plff. to y other. Each party claims a recovery vs y other. As Replevin for cattle avowry. Taken damage Trespass. 2 Mod 149. Cro E 798. Bul 51. 3 Bb. 150.1.

When the General Issue is pleaded, there is no such twofold relation.

An Avowry is in y nature of a declⁿ in several respects.

I In every avowry y avowant claims a Judgment for a return of y property distrained in Eng. or of damages in Court.

2^d The Plff in Replevin may plead in abatement of y avowry. precisely in y same way, as Def^t in other actions may plead.

3^d The avowry tho in y nature of a Special Plea need not conclude with a verification (et hoc est veritas) &c. but closes with a claim of recovery.

4th Lastly if he prevails y fruits of a declaration. i.e. a Judgment for a Return. (or for damages.) 2 Will 117. 6 Mod 113. Co. 376. Cro E 330. 798. Carth 122. Golt 95.

If Tenants in Common lease land, and distress for rent arrears and Replevin is brought on ym. they may and indeed must make several avowries. for their interests are several. The rent due to A and due to B. seen in case of 10 Tenants. They must avow jointly, because their interests are A and not Several. Carth 348. 2 H. R. 387. Fall 398. 1 Ed Ray 423.

Prerogative Writs_

*Mandamus. Prohibition. Habeas
Corpus.*

Mandamus is a prerogative writ, issuing out of
y Ct of Kings bench, in Eng. it was formerly
supposed that the Ct of Chy had y power to issue
this writ, but it was decided *Bernon 175.* y Ct
it had not y power. This power is generally
given by R to y Common Law. Ct of y higher
Jurisdiction. 3 BB. 110. Salk 429. *Bernon 175.*

This is called a prerogative writ, because it contains
a command to some inferior Ct or officer commanding
by virtue of higher authority of y Ct y^t issued
y writ. y performance of some legal duty in a
common inferior Ct. all the Judge does, is to
award y Indgmt of the Law, but in y case
of a Prerogative writ, it is y authority of the Court
itself, and not a mere pronouncement of the sentence
of the Law.

This writ is granted merely in those cases relating
to the Public, and the Government, and only
where there wd be a failure of Justice. 3 Bac 327.
4 Mod 289. Doug. 400.

The object of this writ is to enforce obedience
to y acts of the Legislature, and in Eng. to y Kings
Charters. and it issues only in those cases where
there can be no other specific Remedy. 3 Burr. 1267.
It is therefore a General Rule, y^t it cannot
be issued, when any other adequate remedy can be
had by action. Doug. 506. 1 LL 148. Foul's 377.

In this state, is granted by the Supreme Ct, but
not by the Ct of Comm.

and

This writ is used to restore a person to some
corporate right, or Franchise, wh concern the
Public. 11 Co 33. 3 Bac 522. 13 S. 501. or to admit
him to ym.

This writ issues vs some officer or Inferior Ct. commanding or performance of some official duty, or corporate duty - and can never be issued vs a person in his Individual capacity -

3 Bac. 528. 4 Mod 52.

This writ is demandable of common right, and the Ct is bound to grant it, but there must be some foundation for it, but the Ct have not a discretionary power. 3 Bac 528. Mandamus - Title -

This writ issues to compel an officer of a corporation, to call meetings, to hold elections, and to do any other corporate act, as if a town shd neglect to choose Selectmen. This writ might be issued to compel them. Str 1003. 1157. 2 Lev. 91. Ray 58. 2 S. & 562.

This writ to restore any person to a Corporate office of wh he has been ^{dis}seised illegally, as if a corporation shd at an illegal meeting remove a town clerk. This writ wd issue requiring his restoration to office. Ray 431. 2 S. & 661. 1 Vent 177. 4 Burr 1399. Popph. 176.

This writ issues also to command Persons in authority to do their duty in all cases generally, as to the Judge of an inferior Ct to proceed to Judgment, when he refuses to render Judgment. 3 Bac. 530. 6. Str 113. 2 Mod 6. 871.

So it goes to the Judge of a Probate Ct, or Surrogate commanding him to grant letters of admⁿ when he refuses to do so, upon proper application 3 Bac 352. Carth 457. Galk 292. Str 552. 2 S. & 662.

So it goes in Court from a Superior Ct to a Ct of Com Pleas, commanding it to do its duty.
So to the Clerk of a corporation commanding him

to deliver over to his Successor all books and Papers
of y Corporation. when he so refuses to do. 2 Str 879.
1 Milr 330. Eps D. 663. 667.

I before observed this writ would in cases only,
relating to the public and the government, but as
it is so difficult to determine what shall be called
a Public officer, or what relate to y admⁿ of Justice
and as this writ has of late been extended
to a great variety of cases. it wd take up
too much time to enumerate ym. all, it will
be proper however to mention a few more. ~~to have~~
The new of case been decided y y writ will lie
for y champion of an Mayor, Alderman. Common Council
Towns Clerk. Constables also in Eng. a parish Sexton.
2 Bull 112. 1 vent 143. 133. Ray 211. 1 Roll 330. Talk 150.
Corp. 331. 377. May 74.

This writ lies to restore one to y office of Atty. y,
wh he has been deposed unlawfully. Term D. 70. vent 11.
(Co 94. 3 Bac 530. 2 Bulc 112. 1 vent 143. 133.
Ray. 211. 1 Roll 330. Talk 150. wrong) 1 Lev 540. 3 Bac 530.
12. struck from y Rolle.

But y officer, on y restoration of wh y writ lies,
must be of a certain and Permanent nature, hence
an officer under an institution depending on voluntary
subscription, is not entitled to this writ, such
as Freemasons depending upon voluntary association.
1 Milr 11. 1 Str 331. 4 Str 120. Eps D. 600.

An officer. whose office is an annual one, and has
fees attached to it, may have y writ. Eps D 666.
Str 146.

This writ may issue for all public officer appointed
by Law. such Constable. Tithman. Selectmen.
Town Clerk. for these are all annual at least.

This writ lies in Court to a County Treasurer.

commanding him to pay any money due to a Creditor of y County, when he refuses to do so, also it lies as a Magistrate refusing to levy or lay a County Tax when tis his duty to do so.

1 Silve
40.

Where the office is of a private nature it can't issue to restore it. 1 Vent 143. Co's D. 666.

This writ will not issue to enforce an act while it is uncertain, an y officer or the Ct has a right to do y act. When yt part is settled, the writ may issue. 1 Wils 266. Co's D. 666.

Neither will it issue where there can be an adequate Remedy by action, hence it cannot issue to a Bank commanding a Transfer of Stock, when there has been an agreement to transfer, as y Remedy must be sought by action Doug 506. Co's D 666.

Neither will it issue to compel a Ct to do an act, y doing of wh is discretionary, as to adjourn grant a new trial, continue a cause, &c.

If several persons by the same unlawful act are deprived of their offices. They cannot join, but must demand the writ severally, for their interest is Several. Salk 433. B. N P 200. Co's D. 666. 9.

As to y mode of obtaining this Writ.
The Party is to apply to y proper Ct, when y Ct will generally direct y party complainant of to show cause, why the writ shd not issue, and if he show no cause, the writ itself is issued. 3 Bac 328. B. N P. 199. 200. Co's D. 666. 3 BB. 11.

This Rule however ant universal. ^{Ct} In some cases in pressing circumstances, will the writ, upon y first instance upon an affidavit by y Party complaining,

writ a Rule to shew cause why it shd not be
issued. So also it will issue in y first instances,
when the circumstances are well known to the Ct.
3 B & C 562. 3 B & C 11. vulgo "called Gen Cases"

Nor will this writ issue, till a default appears
in y party vs whom it's demanded. B & P 199.
3 B & C 670.

The writ is issued to y Ct or officer, whose legal
duty is as y act required. 3 B & C 672. Faltk 433.
436.

Where y act required to be done, is y duty of
a part of an aggregate Corporation, it may be directed
to the whole or those, whose special duty tis. to
perform y act. Faltk 699. 701. 1 Str 35. 3 B & C 673.

is not shown.

When sufficient cause, why the writ shd not issue,
it is then issued in the alternative, either to do y
act, or shew some cause, why it isn't done, upon
this first reason. if he shows good reason why
it isn't done, he is Coeused, and by the C Law
this return can't be traversed, but if y Return
was false, y party requiring the writ, might
bring a Special action of Trespass. on the case. 2d Ray 481.
3 B & C 11. 3 B & C 648. 1 Vent 111. Faltk 32. Doug 134. 2d Ray 49

But by the St 9 Anne, y Com. Law Rule is
altered, yt it allows a Traverse. 3 Bac 483.
2d Ray 481. 3 B & C 648.

Our Cts with any St of our own have
adopted the Rule of that St, and now if y
Return is found false, y Plt may have a
Preliminary Mandamus, to do y action required.
3 B & C 11. 3 B & C 648.

So also if the return is true in fact, but appears insufficient on y face of it, a Peremptory Mandamus is awarded. 23. A.D. 201. 3 Bb 111. Co D. 680. 648
At C Law the only remedy for a false Return was, an action on the case. 11. Co 39. 3 Bb 111.

When a false Return is made by several, y action may be brot vs all or each of ym, for tis in y nature of a Tort. and this action may be maintained as well, for suppressing the Truth, as for a positive falsehood. 3 Bae 544. Park 172. 171. Co D. 680. Doug 144.

But if there are several Defs. when a false Return is made, and it appears yt one of ym was opposed to such false Return, but was overruled by the Majority, he shall be acquitted. La Ray 584. Park 172. Co D. 680.

Upon a recovery in this action for a false Return, a peremptory Mandamus issues of course for y falsity of the Return is ascertained by the finding in the action. 3 Bae 544. Talk 430. Co D. 680.

This action to falsify the Return is brot in y C out of y C, wh. y Mandamus issues. Talk 428. Co D. 680.

If after peremptory Rule to return the Mit and the Mit is not returned, an attachment is immediately issued for contempt of C. You will recollect. this Mit is issued to y person to vs whom tis granted, and he thus having it in his possⁿ might destroy it. 3 Bb 111. 3 Bae 457. Talk 429. 34. Co D. 680.

When this Mit goes vs several, y attachment for not returning, must go against all, and if

in fact. either of de^{ft}s. wd have made a Return. he will not be punished under the ~~to~~ attachment. Gr. 808.

The means of coercion y Ct have for compelling obedience. and not returning, are sats to compel a true Return, as they can fine. imprison. till y party complies. 4 BB 287. Cro Ch. 246.

The party is punishable for any disrespect in his Return. 3 Bl Com 111.

Writ of Prohibition.

This is a Prerogative Writ issuing out of y Ct of Kings Bench. to prevent Inferior Cts from trying cases. where not within their Jurisdiction, as to prevent them from deviating from any established Rule of Statute. Law 3 Bl 112. 1 P/Wm 476. 12 Coke 58. 4 Bac 240. prohibition -

This writ generally issues from the Kings Bench, it may however issue in some cases from y Ct of Chy. Com. Pleas. or Exchequer. 3 Bl 112. 12 Co 8. 2 Bl 100. Hobart 15. 12 Co 58.

This writ is directed to some inferior Ct. and y Party prosecuting, and is founded on a Suggestion, yt the Ct is deviating from some St Law. Regulation. or that the question before y Ct is out of the Jurisdiction of said Ct. 3 Bl 112. 2 H Bl 100.

The mode of obtaining this writ, is by a Rule granted by the High Ct, upon motion made to shew cause, why it shd not be granted. by the In many cases an affidavit is necessary.

3 when however it appears from a Proceeding
 yt a cause is out of the Jurisdiction of a Ct, an
 Affidavit is not necessary. When it is not apparent
 however, fact must be made of a fact.

4 Bac 244. 1 P. W. 476. Tulk 540. Hobart 72. Holt 593.
 La Ray 1211.

There has been some diversity of opinion an a
 writ was demandable of right, or an tivas
 discretionary with the Ct, a general opinion is yt
 is discretionary. Hob. 67. Ray 3. 4. Tulk. 30.
 La Ray 220. 378. 86. J. Ray. 92. 4 Bac 242.

Madon 2 24-

Ray 3. 4-

Mistake of Jurisdiction and a deviation from established
 Regulations, are said to be a only ground of issuing
 this writ. 2 H Bl 100.

The Method of obtaining it, is yt a Party aggrieved
 in the Court below applies to the Superior Ct,
 setting forth in a suggestion upon Record, a nature
 and cause of complaint in being drawn ad alium
 Examen. by a Jurisdiction or manner of Process disallowed
 by the Laws of the Kingdom, upon wh of a matter
 alleged to the Ct sufficient, a writ of prohibition
 immediately issues, commanding the Judge not to
 hold and the party not to prosecute a Plea.
 Hence called a prohibition 3 Bl Com. 113. 113.

So far as this effects a party. is analogous
 to an Injunction of a Ct of Equity. If a sufficiency
 of a cause be doubtful. a Party complaining
 is directed to declare in prohibition. i. e. to prosecute
 an action by filing a declaration against the other.
 Upon a supposition, a fiction wh is not traversable,
 yt he has proceeded in the Court below taken
 a writ of Prohibition, and if the Ct shall
 finally be of opinion, yt a matter suggested
 is a good and sufficient ground of prohibition

in point of Law. Then Judgment with nominal damages shall be given to the Party complaining, and the Def and the Ct (Inferior) shall be prohibited from proceeding any further. 3 BB 113. Cro E. 736. 4 Bac 248. 1 Leon or Lev. 120. 4 Mod 157. 2. Barker Notes 158.

But if y cause suggested, is deemed insufficient, then Judgment is awarded in favour of Def. in this fictitious action, and a writ of consultation is awarded, and the cause is remitted to the Ct below. 3 BB 114.

Sometimes, however this writ of consultation is awarded or issued, when there has actually been a writ of prohibition granted?

The party prohibited may take a declaration pursuing the suggestion and traversing the facts on wh y prohibition was granted, y Ct then recalls prohibition under the appellation of consultation. 3 BB 114.

And sometimes the Ct itself without any action or declaration award a consultation, after prohibition has actually issued, when upon mature deliberation, y Ct is satisfied, y cause suggested was not valid.

The mode of enforcing obedience is the same as in a writ of Mandamus. As by Fine &c. for disobedience is considered a contempt of Ct. 4 Bac 262. 4 BB 287. F. N. B. 40. T. & H. Herbert 40-312.

And if y party prohibited commences a new 4 Bac 262. More 502. 1 Leon 31. suit for y same cause, and in the same Ct he is punished for contempt, for tho it suit literally a disobedience, still tis an evasion of y command

If y Plt in y Inferior Ct does proceed and is attached, y other Party may upon the Attachment recover costs and damages for y injury done him by this subsequent proceeding, for such proceeding is a vexatious Suit, and he may kept in prison, till he pays the costs and damages, y Ct shall award, and he may also be punished for contempt of Ct. Cro Ch. 559. 1 Vent 348 3 Lev 360. 4 Bac 248. 9. 262. - 248 m -

Never a Ct in Count vesting y power of issuing y writ in the Superior Ct. 10 Count 347. 8.
Prohibition -

Writ of Habeas Corpus

This is a prerogative writ of y first importance, By this writ, any person restrained of his Liberty, may be brd before the Superior Ct. for some special cause. This may be done on application by the Party himself, or on application of any other Person having a right to require his appearance, in Court. 3 BB. 129. = 31

There are various kinds of this writ. The first is the writ of Habeas Corpus, ^{ad} responderum. As when a man has a cause of action vs one who is confined by the Process of some Inferior Ct. in order to remove him and charge him with y new cause of action in the Ct above. This writ used in Count. 3 BB 127. 3 Bac 2 2 Mod 198.

The Second Kind is y writ ad satisfaciendum - This issues, when a Prisoner has had Judgment rendered against him in an action, and Plt wishes to bring him up to some Superior Ct. to charge him with Process of Court. Neither is this necessary in Count. 3 BB 129.

The Third Kind is the H.C. ad faciendum et recipiendum. This is issued when a person is sued in some Inferior Jurisdiction, and ~~then~~ is desirous of removing the action into the Superior Ct. In this case he is removed by Process and the proceedings by a Certiorari. This Writ is sometimes called a Habeas Corpus Cum causa. 3 Bac. 2. 15. 1 Mod 230. 2 Mod 198. 3 Bb 130.

This writ is demandable of common right, and with a motion it superseeds all Proceedings in the Inferior Ct. and any subsequent proceedings in that Ct. are void, as being "non Coram Iudice" and the power of such Inferior Ct is terminated at the moment this writ issues. 2 Mod 306. 3 Bac 15. 3 Bb 130. Talk 352. 12 Mod 556.

But this writ is matter of common right it will not be granted or proceeded on, when consequence wd be the Abatement of a rightful Suit, for in such a case the Ct wd award a Writ of "Procedendo". Thus if a feme sole is sued in an Inferior Ct, and having married "pendente Lite" she attempts to remove it to a Superior Ct. y Suit must abate, if the writ is granted, as she could then plead the Non Bond of her Husband in Abatement. 3 Bac 15. Talk 8.

Neither is this kind of Writ used in Court. - as a person has a right by Law to ^{appeal} apply to a Superior Ct. If he chooses.

Another kind of this Writ is the Habeas Corpus ad Testificandum. This issues when a person having a Suit in the Ct below, wishes to procure y prisoner to testify for him, if he is

bro't up. vizt. this writ, it will be considered
voluntary an Escape. 3 Bac 3. 3 Feb 57. Comb. 1548.
Selden 13. 3 Co 44.

When y^e Ct itself is holden within y^e Limits of
y^e Prisonard. y^e practice is in Court to bring y^e
prisoner up by a verbal order only. as if a cause
was pending before y^e Ct in Litchfield, the
Judge wd order the Shff to bring up the Prisoner
to testify and remand him to Prison.

It was once holden in Eng. that if a Shff
bro't up a prisoner on this writ, he wd be
liable for an Escape. This doctrine however
has been properly exploded, for it wd be truly
a hard case: if the Shff shd. be punished
for disobeying the writ, as he might be, and
be punished for obeying serving it. as according
to this doctrine he wd be liable, an he bro't
him up. or not. 3 Co 44. 2 Bac 238. Selden

13.

But if the Shff shd give the Prisoner unnecessary
and unreasonable Liberty, so that he escape, he wd
be liable, and it has been decided in Eng. that
where the Shff took the Prisoner round a circuit
of 60 miles out of his direct course, he was liable
for an Escape. The Rule is, y^t the Shff shall
bring him up in the most convenient time and
way. 1 Mod 116. Cro Ch. 14. Hoberts 202.
3 Co 44. 2 Bac 238.

This writ never lies to bring up a Prisoner of War,
as the Com. Law lts have not y^e power to issue
it for such purposes. Doug. 403.

There are a number of other kinds of this
writ. but as they are not much in use,
I shall omit y^m. - you will find them.
2 Bac 2. and 3.

The last and only one of wh I shall treat,
is the writ of Habeas Corpus ad subeundum.
This writ is directed to a Person having in
custody the Body of another person, commanding
him to produce y Body of the prisoner, with y day
and cause of his Captiv and Detention, & to do
submit to, and receive whatsoever, y Judge
or Ct awarding such Writ shall consider
in y^t behalf. 3 Bb. 131.

This is a Com Law Writ in favour of the Liberty
of the Subject, and it is y great Writ by wh
a Release is obtained from any illegal confinement.
3 Bb 131. 1 Burr. 631. 1 Root 92.3.

Where a person is committed for contempt,
by either house of Parliament, he can't be
discharged upon this Writ, and indeed every
Legislature established on the principle of Eng
Jurisprudence, have a right to punish for
contempt, and the Ex^t of this right cannot
be interfered with by any Ct of Justice.
8 YR 314.

This is considered a writ of so much consequence,
y^t every facility is afforded for obtaining it.

By C Law. it issues from y Ct of Kings bench,
and Chy. and by 16. It Ch.1. it may issue
from the Ct of Common Pleas. 3 Bac 3. Cro J. 543.
4. 2 Vent 24. 2 B 856. 3 Bb 131.2. 2 Mod 198.
2. H Bl 144. 1 Root 92.3.

Where a person was committed for some criminal
matter, y Ct of Kings Bench and Exchequer, could
only take Bail for his appearance at Court,
but since the 16. Ch.2. y full benefit of
y Writ may be obtained 3 Bb. 132. 2 Mod. 198.

There has been a great diversity of opinion,
 as this writ might issue out of the Ct of Chy.
 in vacation, but in y case of the application
 of Jentes. it was decided
 yt y Chancellor can't issue this writ in vacation.
 3 Bb. 132. 3 Bac 3. 2. 2. H Pl. 147.

This writ is directed to the Bailor or person
 detaining the Prisoner, commanding him to produce
 the Body with the cause of detention.
 3 Bb. 157. Salke 350. La Ray 586. 1 Vent 330. 46.

The Person and cause of detention being presented
 to the Ct, he is either discharged, admitted
 to Bail or remanded to Prison.

If the detention is illegal, he will be discharge.
 If Lawful and he is entitled to Bail he
 will be bailed. But if it is Lawful, and
 he aint entitled to Bail, he will be remanded
 to Prison. 3 Bb 134. 5 Mod 22. 1 Vent 330. 46.

The object of this writ is to give Specific
 relief to persons restrained of their Liberty without
 Lawful cause. In certain periods of Eng Jurisprudence
 y benefit of this writ was lost by the subservience
 of the Judges to the Crown. - as they wd frequently
 evade the Law.

But these Evasions were entirely prevented
 by the St 31. Ch. 2^d. wh it rendered the
 writ more Remedial than it was at C Law.
 3 Bac. 78. 3 Bb 135. 6.

By the St. either of the 12 Judges of Westm.
 might issue this writ in vacation.
 3 Bb. 131. 136.

This writ may issue by any Person in favour of the King, his Privy Council or Secretary of State.
3 Bl 135. 6.

It is sometimes suspended as in War. Rebellion for as the Parliament had the power to authorize the writ, so it has a power to suspend it.
3 Bl 135. 6.

But this Writ never issues for a Relief of Persons committed upon an ~~Err~~ or Conviction for if the Judge be wrongful, he must seek his remedy by other means established by Law.

Neither can he be bailed upon a final process and in cases of Treason and Felony, a Writ will not issue see It 31. Ch. 2.
3 Bac 9. 3 Bl 136. 10 Mod 429. Str 142.

But according to the description given of this Writ, it lies not only where a person is confined by a Sheriff, but also in favour of any person whatsoever who is illegally confined. As where Children are confined by their Parents, a woman by her husband, it lies in favour of Guardians, Wardes, also Servants.
3 Bac 15. 3 Keb 526. 2 Lev 128. Str 982.

And a writ may be sued out by any friend of a person confined, as well as a Person himself. Str 982. 1 Bur 606. 36. 5 Mod 21.

This writ is issuable in Court by the Sub Jt or Ct of Com Pleas. or the Chief Justice of either in vacation. It Counts Vol 2. Title. Habeas Corpus.

Disobedience of this Unit is punishable by Fine,
Imprisonment, or Corporal Punishment.
3 Bac 10. A. H. N. B. 68. 12. Mod 666—

102.

2 or 2 $\frac{t}{2}$ 7 $\frac{1}{2}$ 2 — 2 2 2 . p u u u u .

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Pleadings

Pleadings in civil actions are defined the mutual allegations between Plt and Def. in a suit, made out in Legal form, and delivered in writing. 3 Bl 293.

All Pleadings were originally oral, and delivered verba tenus, or "in the voice" from one Party to y other, Hence they are frequently in Norman French, denominated the Parol.

But at y^e day, tis necessary y^t all Pleas upon wh a party relies, either in support of his action or in defence, shd be delivered in writing - 10 Co 132. Bac Pl. 1.

The Pleadings and Indgments in books of Reports, present 3 different languages, and these correspond to the 3 different periods of Eng History - viz Norman French. Latin and Eng. The french as its name imports, was introduced at y Norman Conquest. & continued to be the Legal Language till 36. Edw 3^d. Lawes 23. 9. 3 Bl 317. 24.

The Latin was then introduced, and made y Instrument of conveying and diffusing the Law. till it was subverted by the English. during Cromwells admⁿ. After the Restoration y Latin was revived, but was entirely superseded by St 4. Geo. II. Lawes 2. 3. 9. 4 Bac 1. 3 Bl 317. 324. But by 6. Geo 2^d Sickness are to be in Latin. 3. Bl. Com. 322. 3.

But what are those allegations? They are y setting forth on y one hand, y facts wh constitute in Law. y Plt's demand, and on y other y Def's defence. 1. TR 159 Doug 278. 4 Bac 1.

Ld Mansfield says Pleadings are founded in sound sense and y strongest logic.

Pleading is strictly a mere Logical process, and the Rules of Pleading according to Sir Wm Jones, constitute a beautiful system of Legal Logic. Every good declaration (and every good Special plea) is substantially, (if not in form) a good syllogism. For instance, the plea in a case of "Quare Clausum fregit" vs him who forcibly enters upon my land, I have by Law a right to recover damages, y Def has forcibly entered on my land. ergo I've a right to recover damages from him. 1. Burr 319. 3 B6 306. Lawes. 2. 3.

The 1st or major proposition is not usually expressed, (as the Judges are supposed to know the Law ex officio) Formerly it was. It need not be, however, because the Judges being supposed to know the Law, y expression of it is of course superfluous. Ld Ray. 21. 88. 175. Ch. B. 184. 5. 234. statutes

Particular customs and Private Statements must however be pleaded like any private document.

The 1st and Major proposition, then, contains y Legal Principles on wh y Pltff relies. The Minor proposition states the facts, to wh y principles apply in the particular case. The conclusion is an Inference of Law from the application of the principles to those facts.

2. On the defs side, y Major proposition, or legal principle is to be denied by an Issue

at Law. (or by motion in arrest of Judgment)
 Found or with denial is called a Demurrer.
 For since y proposition is matter of Law, y
 denial must also be so.

The minor proposition must be denied by
 matter of fact, i.e. by general (or Special) Issue. Luce. 9. 3. 32.

The conclusion can be denied in neither of these
 ways, for if y first proposition is true, in point
 of Law. and y 2^d in point of fact, y conclusion
 is inevitable.

Suppose these both true, y Def must rest on
 something Collateral.

A Special Plea admits the Law and y fact
 but alleges some new matter, and ^{it negates the conclusion} a negative
 conclusion. The Plea of Releaseth is as follows.
 If the Pltff upon whose land, I've forcibly
 entered, releases to me his right of action,
 he is debarr'd from his right to recover
 damages. But he has released to me his
 right of action, and is therefore debarr'd
 from his right to recover damages from me.

Tho' y^s may be true, yet another Plea may
 be gone thro' by the Pltff, of y same nature, as
 Duress, and so on. The Pltff may demur to
 y principle, or allege, that the Release was
 obtained by fraud. The great object of y^s
 process, and of course of all the Pleadings, is
 to simplify y ground of controversy, so as to
 make the suit depend as much as possible
 on a single point. This is a short description
 of the General nature of Pleadings.

1st stage The first stage of a suit commenced, is y Mitt.
 By Suit y however, is no part of the pleadings. It is a
 mandatory letter directed to the Shff, to compel
 y Def. to appear and answer to the charge
 alleged. 3 BB 273. 85. Corp 454. 1 Mil 147.
 1 IR 4. Cro J. 11.

I will remark, in passing, however, yt when a
 suit is commenced by a bill, as in N.Y. y bill
 is considered as the commencement. This is in fact
 a declaration founded on the Petition Mitt, called
 y "Latitas"

that

In y Eng practice, and, wh conforms to it in this
 country, y date of y writ may be fictitious - but
 y cause of action must exist at y time of the
 writ issuing. The true time of a writ issuing
 may be proved, to let^m y plea of Tender or the St.
 of Limitations. It is 608. 1 Mil, 141. 3 BB 373. Lawes 78.
 Pea Cri 359 Corp 454. 7 IR 4. 1 Mil, 147.
 2 Burr 960. Carth 233.

By the Eng practice, and yt of most of our States,
 y writ issues, and the declⁿ ^{for} the release
 of y writ. In Court however they both issue together.
 I G. don't like y Court practice on account of
 y time required.

The first stage in the Pleadings is y declaration,
 as y writ is y commencement of the Suit, so
 y declⁿ is y commencement of the Pleadings.
 The Latin Placitum signifies any sort of Pleadings
 y term is "nomen collectivum" Flow 84.

3. 1 Saund 338. n. o. 4 Bac PC 186. a. 1 D 6-

The count or declaration is an amplification of
y writ, adding circumstances of time and place.
The writ expresses the general complaint, The
Count expresses y^t complaint with y particular
Laws. 1. 2. 3 BB 293. 9. 301. 4 Bac 106. 1. 6.

The next stage is the def's Plea or answer to
y declaration, for if he shd not answer, judgment
wd go vs him. 4 Bac. 1. 6. 3 BB 299. 301.

Pleas on y part of y Def are of 2 sorts.

1st Dilatory Pleas. 2^d Pleas to y action.

Pleas to y action, are Pleas in bar, and peremptory
Pleas, ^{these} are convertible terms. Ibid

1st Dilatory Pleas are such as tend to delay
y Suit, by questioning y mode in wh it is to be
tried, rather ym by denying Plffs ultimate right
to recover, and will if successful defeat the Suit,
Ibid 3 BB 301.

Dilatory Pleas are divided by some commentators
into 5 or 6 kinds. but they may all be comprehended
in y 3 following classes. I. Pleas to the Jurisdiction
of y Ct. 2^d Pleas to the disability of the Plff.
3. Pleas in abatement properly so called.

All dilatory Pleas are frequently called Pleas in
Abatement, but erroneously, for there is a material
difference 1. Tidds 172. 2 Laws 37. 3 BB 302. Ch n.

II Pleas to y action. These answer the merits
of the Suit, always denying the Plffs right to
recover, or y cause of action. The cause of action
may be denied in either of y 3 following methods.
I. By denying y allegations of y Plff, 2^d by

confessing and avowing them, to which may be very properly added, 3^d By pleading matter of Estoppel, For this last plea don't strictly deny or confess y Pltfs allegations. 3 Bl 383. 5 b. Lawes 37. 8. 115. 130. 40. It shows he has no right to make y allegations, and y result is y same as a denial.

Ist Pleas to y action, wh deny the complaint, are of 2 kinds. 1. General Issue., 2 Special Pleas. in Bar. They are both however Pleas in Bar. The one General and the other Special. Ibid.

These are y only modes of denial by Pleas to y action. The cause however may be denied, by a Demurrer. The demurrer is not a Plea, but a denial of the Pltfs right to proceed vs him. He denies, that he is bound to plead, and prays Judgment, an he is bound to plead or not.

Mr Lawes says it is an irregular mode of Pleading. A Demurrer is ^{not} confined to any particular part or species of Pleading, and y mode of denying is not strictly a Plea.

The Pltfs says he is not bound to make a Plea. The office of Demurrer is to deny the legal sufficiency, of the allegations of y opposite Party to avail him. Indeed the practical language of a demurrer is, even admitting what you say, it avails you nothing. Co Litt 72. a. 5 Mod 132. 4 Bac 129. 30.

5 The following Rules apply to Pleading in General.
Ist In all Pleadings, 2 things are indispensably necessary. Ist That y subject matter of the allegation, be sufficient in point of Law. 2^d That y matter be expressed according to y strict forms of Law.

and omission of either of these requisites, is a Fault, and therefore a cause of Demurrer. Hob. 164. Corp. 683. Bac. ab. P. De. vide post 12. 11. neg. Preg. 67.

If The fact be insufficient, y fault is in substance, and may be reached by a General Demurrer, If in form, y fault is in form only, and can be reached only by a Special Demurrer. Corp 683. Hob. 164.

As a General Rule, it is necessary to allege matter of fact, and conclusions drawn from these facts. It is not necessary to allege y Law upon ym. It is necessary to allege facts in all Pleadings, and facts may be declared upon, y exist only in Fiction. The mere Ev of a fact is not sufficient. The Ev of a Fact don't express its existence.

5 TR 70. Doug 159. 1 Lev 164. 1 St 793. Lawer. 46. La Ray. 1517. Cro J 383. Cro E 913. Post 12. 3 Post 74.

II When from facts alleged, y Law presumes a promise, y promise must be expressed. Thus in an action of Trover, it is not sufficient to allege a demand and refusal, y plea must express a promise to grant on demand.

2 La Ray 1517. 1 Ch 136. Salk 663. Cro E 913.

2 N B. 63. note. La Ray 553. 4 Maf. 457.

To y case last stated, there is a single Exception, On a bill of Exchange, it is not necessary to state, after all y facts are stated, a promise on y part of the Acceptor. This is the Law. tho y universal practice is, to conclude with a promise.

1 Salk 128. Drawing a Bill, La Holt says, is La Ray. in fact, a promise. He Judges the proportion itself ^{538.} altogether arbitrary. Post 12. St 224. 2 N B 63. Lid Bills. 190. ⁴⁵⁷

6.

III It is necessary, yt all Pleadings shd be direct, and not argumentative, or stating by way of Inference; in short all the facts on wh y Parties rely, must be stated in direct Terms. Otherwise no Issue can ensue. There being no direct affirmance or Negative wh can constitute an Issue.

It shd be direct. 1st For y sake of certainty and regularity. 2^d So yt y opposite party may take issue upon ym. 8 TR 278. Lawes. 175. 6. 131. 2.

Plow. 128. 1 Inst 303. Bac Pl. 4. Lawes 175. 6. 69. Yelv. 233. 1 Saund 117. n. Cro. J. 383. Rule requires qualification. see Post 21. 2 Mafr. 318. 4 Bac. 22. 3 Leon 300. Co Litt.

An averment in this form wd be good. "this" 3^d "quod" "quia" "scilicet" 1 Saund 117. n. 184.

Plow. 155. 6. Yelv. 21. or 121. again. "because" is satis direct to introduce a material fact. So also y words. "Scilicet" "videlicet" &c 1 Lev. 194. 2 Root 276. 8. Cro. J. 383. Lawes. 47. 64. 2. B et P. 447. 1 East 203. 2 Ch. Re 197.

IV Each party admits of course so much of his adversaries plea, or allegations, as he don't deny. Salk 91. 1 Inst 305. Hob 234. Lawes 52. 1 Mil. 338. 4 Bac 273. The Parties in making reciprocal allegations vs each other, and each has a right to deny, and if then either admits this right, he tacitly admits y allegations, wh he does not deny deny.

V. Each party's plea is to be taken most strongly vs himself, for each is presumed to make y best of his own cause. Post 177. 91. 4 Bac 273. Salk.

91. 1 Mils 338, note these authorities apply to y last Rule.) Lach. 186. 4 Cas 343. Ch. 241. 2 H Bl 530. 4 Bac. 2.

VI In pleading a traversable fact, it is necessary ⁶ to plead it with time and place. The Reason for y time is found in that rule wh requires certainly + T R 057. Lawes 578. Post 10.11
2 East 497. 11 Idia 226. 2 How. 4. 6. Feb 9. Co Lit 303. Post 10.12.

The reason of y place is, y^o they may know where to call the Party. In transitory actions, it ant necessary to alledge y time and place. It ant necessary to alledge y place in any action, not traversable.

There is a distinction between alledging a place by way of local description, and alledging it by way of "venue".

If A alledges that B committed an assault in y town of C. & county of D. it is not necessary to prove it. The place being in this case alledged by way of "venue" merely. But if A alledge y^o B committed an assault in y house of E. in y town of D. as a local description and must be proved as laid. Idia.

VII The number, quantity and price of things pleaded, need not be stated truly, except when a mistake not occasion a variance, a variance is an incongruity, between what is alledged and a written contract. See Pleas in abatement.

Thus he may declare y Def received 100 lbs of Flour, and if upon trial, he shd prove but

It still is declar^d to be good, for it was occasion
no variance. But if he declared upon a written
agreement, and states it different from its true
meaning, and even extent, he does it at his Peril.

It does not in his special promise to pay him
100. Dole. and proves a promise to pay 91. or 101.
y. Eri. wd be inadmissible, for it wd occasion
a variance. Lawes. 4.9. 57. 171. 2 East 233.

It is a maxim in Pleading, yt mere surplusage
or unnecessary matter, does not vitiate y. Plea,
"utile per inutile non vitiatur" but yt
repugnance or self contradiction does.
There is a distinction here.

Repugnance in a material point is a fault
in substance, and is an incurable fault—

While repugnance in an immaterial point,
is a fault in form, and advantage can be
taken of, only by a Special Demurrer. Lawes. 4.9.
8. 71. 2 East 333. 10 Litt 303. 6. 4 Co 42. Cro. 6. 337
+ 3. Bac 82. Cro. 6. 618. Cro. 6. 288. 9. 4 Bac 284.

VIII. Every thing shd be pleaded according to
its Legal operation, tho it shd vary from y. form
and structure of y. thing. Thus If one Tenant
shd convey his right to his Co-Tenant by deed,
or Assent. This assent shd not be pleaded
as such, but as a Release. 1 HL 446. Cro. 6. 333.
Com. D. R. 237. 1. Saund 96. 7. 1 HL 313.
2 Do. 1. 2d Ray. 450. Ch. 48. 180. 7. 234. 1 HL 313.
333. 8. 503. 3 HL 182. Ch. B. 334. Cro. 6. 332.
2 HL 404. 7. 4. Bac 100. 10 Litt 103. 1. 1. 502.
Lawes. 52. 2d Ray. 450.

Again a B^c B^c payable to a fictitious Payee
shd be declared upon payable to y Bearer,
for yt is its legal effect. 3 I.R. 182 481.

Tho it is said, yt every thing shd be pleaded
according to its legal effect, or signification, yet
yo Rule is not strictly imperative, for it has
always appeared to me, yt a contract may
be pleaded as it is. and the Ct will decide
in what manner, it shall operate. (But it
is y most Lawyerlike way to plead it according
to its legal effect. 2 H Bl' 11. 12. Doug 642. 1 H Bl'
313 563. 3 I.R. 182. 481. Ch. B. 185. 7. 234.

IX That wh appears sufficiently obvious from the
nature of y Record itself, need not be formally
averred as if a man B in Taver, for taking
and converting to his own use 100. Gold Spanish
milled, It ant necessary to alledge y value,
for yo appears from the Record. Plowd 60.

81. 4 Bac 2. 7. Co 40. 9. ibid 54. a. b. 11. Mod 25.
a

X When necessary circumstances are implied,
in facts yt are alledged, it is unnecessary to
alledge them; Co Litt 303. b. 1 Sam. 228. b. 2 ibid
305. a. n 13. Falk of Lawes 48. 2 Ch. B. 214.
in pleading a Feofmt against Livery of Seisin.
is pleading profert, and tis somewhat singular, Buller
shd state that ^{or an} Example in wh y verdict
wt cure the fault, when in fact, no fault
is in y proceeding. This observation has been
frequently made, and I'm surprised to hear
it from J Buller who was the ^{1st} most Special
Reader of his day see "A note of Judgment"

That which appears on the Record, need not be formally averred, Cro. E. 302. 7. Co. 43. "Ibinc pluit et nunc tota selere quidam"

XI. Blending matter of fact and matter of Law, so that they can't be separated, in an issue taken in that Pleading, is bad Pleading.

As suppose a Plff. asserts, that he is legally entitled to all y effects forfeited by felons, in a certain county. This blends matter of fact and matter of Law, for y fact is dependent on 1st ascertaining what y Law is.

+ Bac 68. n. Mod 30. Lawes 138. because matter of Law cannot be traversed.

XII. What is admitted by both Parties, in Pleading, cannot be post contradicted, even by a verdict, for a Jury have no power to find a verdict contrary to y admission of both Parties.

Q. B. N. P. 289. 2 Mod 31. Lawes 148.

XIII. General Estates in Fee simple may be alleged generally, ^{Plff} i. e. he may aver simply, y^e he was seised in Fee simple, without declaring how, or in what manner. But when a particular Estate is pleaded, y commencement must be pleaded specially. The reason of y^e distinction is not obvious. It appears however, to be this.

A General Estate may commence with a Tort (i. e. disseisin) and y^e tort is matter for y Jury to find, but a particular Estate cannot so commence. It is always supposed to be acquired by some legal Title.

The method of acquiring it, therefore, is known, and must be stated, with y time and manner.

of obtaining *posse*. This Rule don't hold in declarations, but always subsequent pleas—

In a declaration a general mention of a Particular Estate may be affirmed, but when a particular Estate is denied, and pleaded in any Pleading, after a Declaration, the time and mode must be specially stated. *Id.* Ray 331. 3. 4. 3 Hill 72.
Falk 562. Co Litt 302. a. Bro Ch 338.

XIII It is a Rule yet ~~an~~ immaterial averment, when contradistinguished from impertinent averment, must be proved as they are alleged. Impertinent averments never require proof. I.e. a Special averment where a General one would be sufficient.

The Rule is this, where a variance results, from not proving it, ~~as it is~~ it is necessary to prove it. It is said in a note in *Douglas*, yet the rule of proving immaterial averments, extends only to Records and written contracts. *Doug.* 640.
 659. 659. n

This note, as I conceive, ~~is~~ erroneously expressed, it shd be Express contract, for there may be a variance from a Parol contract.

The following is a case in point. a Land Lord bro't an action vs a Thff., for taking all y goods from the Premises, so as to leave none for the rest of the Tenant. He deduced his Title, by saying y't y Tenant was to pay so much semiannually, y' latter clause was an immaterial averment, and unnecessary to be stated. It was not however true, but being necessary to prove it, when stated, he lost his Suit, when failing to prove it— If y whole averment cd be struck

out without injury. it is Impertinent. Le Mansfield says.

Immaterial does not mean Impertinent, but unnecessary. An Impertinent Averment needs never be proved, for it is wholly foreign to y Case.
 1. 1 R. 235. 2 Ch. Pl. 331. 3 East 446. 92. Doug. 669. n
 2 36 R. 1104. 5 Eb 33. 521. 3 1 R. 643. 2 McHale, 501. 13.
 3 A P. 7. Ch. Pl. 306. 2 Sand 200 a. n. 22.
 Eb 521. * new edition.

The contract shd not be falsely stated, and if it is creates a variance, an y contract is written or Parol. (as I think) a parol contract may be a Special contract as well as a written one.

Barton vs Wright. Doug. 669. An Important case! by referring to wh we may see a distinction between an Impertinent and Immaterial Averment.

XV If y declaration or other Pleadings want form only, as if they omit y necessary circumstances, or time and place, and y adverse party don't make Special Demurer. but pleads over. he cures y defect. In like manner if he pleads double, and he pleads over. y fault is cured. But if either Party makes an Error in substance, it is incurable - it can't be cured by pleading over. By substance, is meant such matter of fact, as constitutes y grounds of action - it is y foundation of the averment, & defence, and matter of Form is merely y method of stating the defence. 4 Bac 2. 8. Co 126. 30. 7. Ibid 25. a. Co Litt 303. Talk 519. 2 Bent 222. 1 Lev 195. 3 Ibid 31. Carr 336. 661.

XV. It is a general rule, yt a Party need not allege any thing more, yⁿ will "prima facie" amount to a sufficient cause of action. A party pleading, is bound to anticipate what may possibly be asserted in defence. As to sufficient for a to declare yt B. at such a time and place, ought to have ~~xxx~~ paid him a sum of money. B may have been an Infant; still it don't alter y ground of action. 2 Wils 200. 2 Burr 1037. *Ed Ray* 400. 1 *Tanna* 299.

This Rule don't hold with regard to Pleas in abatement. *J Cotsopel Ed Ray* 400. 1 *Tanna* 299.

XVI. If y pleadings on one side express a material averment, wh y other omittes, it cures y omission. As if Plt omitts a necessary averment, and def shd allege such averment in defence, he cures y Plt's omission. The Plt avers y B took a certain Iron Hook, wth avenging he took it from his possⁿ; now if B. instead of demurring, pleads "yt Mr he did take It." it cures y omission. Post 24. 132. 3. 1 *Id* 184. *Ed D* 588. *Com & Pl C* 88. or B 37. 5 *Bac* 197.

XVII. New matter alleged in any stage of y proceeding after y declaration, must conclude with a verification. New matter of fact is whatever is pleaded in avoidance on one side, and in support of the allegation, contained in y declⁿ on y other. in short every thing except a complete denial. He cannot put himself upon his country. The verification is y established mode of keeping the Pleadings open. This Rule is universal at C Law. Except by Eng St 5 Geo. II^d in case of a Plea of Bankruptcy - Post 77. 89.

Laws 115. 45. 227. Doug 58. Comp 575 2 Burr 772.

Why is it necessary yt y^s new matter shd be left open? In every successive stage of y^e Pleading y^e adversary must have room to reply in either of these three modes.

1. To y^e County. 2^d By avowing them. 3^d By Demurer. Now if the Def make a Special Plea. in bar. y^e Plt^f wd be deprived of either of these 3 modes. wth a verification.

The answer to a Plea in Bar is called y^e Replⁿ. y^e answer to a replicⁿ, y^e rejoinder. - y^e answer to the Rejoinder, y^e Surejoinder, y^e answer to y^e Rebutter, y^e answer to y^e the Surebutter.

The Surebutter is y^e utmost limit, to wh^{ch} Pleadings have been carried. 1 Lunda 303. n. 3 Bl 307.

Comp 575. 2 Burr. 772. Doug 58. Laws 19.

14. 148. Ch. 243.4.

The object of y^e Plea in Bar, is to defeat y^e declⁿ. yt of the Replⁿ. to fortify the declⁿ. by defeating y^e Plea. That of the Rejoinder, to fortify y^e Plea in Bar. by defeating the Replⁿ &c.

The object of each, is to fo. lify what he last said. by defeating what is advanced by his adversary. 3 Bl 310. Pleadings not answering these purposes are bad, for each Party must abide by his original ground of action or defence.

The Pleadings being closed, an they terminate in a Demurer or an Issue in fact. Indagmt must always be given on the whole Record, and not upon any single, or detached part of it. Thus. If y^e declⁿ and a Plea in Bar are both bad, and the Plea be demurred to. Indagmt must be given for the Def. for the Plea

tho bad, is good enough for y declaration,
 & so tho y whole Pleading. Indgmt will always
 go vs that Party, on whose side, y first
 material defect appears. *Id* Ray. 1399. or 1449
 1 Inst 304. a. 3 Bl 310. 2 H Bl 280. 1 Tanna 280.
 Palm 173. Hb 199. 8 Co 120. 133. 9 Co 100.
 Ch. 243. Str 422. 4 Bac 6.

9.

Of the Declaration or Count.

The declaration and Counts are generally treated
 in the books. as Synonymous. & when the Plff sues,
 in only one cause of action, and makes but one
 statement, they are.

But when there ^{are} different causes of action declared
 upon, or when different statements are made,
 of y same cause of action, then each separate
 statement is called a Count, and all y counts
 taken together form but one declaration. *ante* 3.
 3. Bl 290.

When there is in fact, but one cause of action,
 we often find several counts, y object is, to
 prepare for any possible contingency in evidence,
 and to enable the Plff to recover upon one, if
 he is unable to prove any one of y others. And
 if he can prove any one of the Counts, he will
 be entitled to Judgment, and will recover
 "secundum allegata et probata"

The declaration being the foundation of y claim. *Chit* 283.
 must show every fact, wh^{ch} is material to y cause of action, and these facts are called the 4 Bac. 515.
 "gist" For nothing can be proved, wh^{ch} isn't
 alleged, and if every thing material is ~~alleged~~
 proved, he can't have indgmt. *same* 515. *Inst* 1. a.

If y declⁿ contain any thing wh shows, y^t y Plt^f at y commencement of the Suit, had no complete cause of action, he can never have judgment on that action. 2 Saund 397. 7 Le 24. 5 Plow 4. Cro & 325. Bac Ab. P. Post 23.

Thus if in debt on Bond, y Plt^f state y date of the bond, & day of paymt to be after y date of y writ, it will appear on the face of y declaration, y^t the Plt^f at y commencement of the Suit, had no cause of action Cro & 576. 4. Post 10. 54.

A Judgment for the plt^f made in y case will be erroneous, even on verdict, y defect is incurable Cro & 574. Coups 454. 3 Bl 273. 7. Pl 4. 4 Doug 61. Cro & 325.

From what time a Suit is said to be commenced. 3 Bl 273. Coups 454.

But if y Party bound by contract, disables himself, to perform. he may be sued before y time fixed.

As if A covenants to convey certain lands to B. in 6 mths, and before yt time, he conveys to C. 4. or 5 Co. 1. 2. 5 Co 21. 22. "see Covenant Broken"

§ 141

15-

The omission of any fact wh is essential to y right of action, is an incurable defect. Cro & 574

The "gist" of y action is "y^t writ wh there can be no cause of action." In assumpsit, y consideration. In trover y "conversion" is y gist. Bac. Ab.

Sec² 5. Mod 350. 8. Mod 350.

In such cases, y Def^t has good cause of Demurrer and if he is allowed, and verdict go vs him, he may arrest the Judgment, or after Judgment, he may bring a writ of Error, and reverse it.

Doug 574. 618. 58. 14 Bl 72. 7. Co 10 a. 1 Pl 645.

2 H Bl 574. 211. 3 Bl 395. 4 Bac 8.

It follows then, yt when a Pltfs right of action, must accrue on y performance of a condition precedent, y Pltff must aver y performance of y condition, or yt y Def prevented him.

Thus If a promise to B. \$100. on condition, yt B shall build him a house, B in suing for it, must aver. yt he has built y house, or that a prevented him from so doing. 3 N.R. 240.

Doug. 656. 7. Co 10. 1 H.R. 125.

An averment yt a has not paid y money, without more wd be insufficient. The omission wd be incurable 1 Saund 309. 1. 1 H.R. 254. 1 East 203. 1 Ch. 509. 7. H.R. 125. Bac Pl 93. 1. 3 Bl 395. Eb D. 310. Cro J. 645. Mod 309. n. 1 East 303. 8. 619. Com. Dig. b. n. h. c. 57.

But when y Pltff right of action, is qualified by a condition subsequent, he ant bound to take notice of it. A condition subsequent is not matter for the Pltff, but for the Def to aver upon. Thus in an action on Penal Bond, conditioned for y payment of 500 hundred Lole, y Pltff ant bound to take any notice whatever of y condition, but may declare upon the Penal part of the Bond. Com. D. C 54. 54. 1 H.R. 254. 2 Ebd 574. Eb D. 300. 1 Pow C 339. 5 Co 10. Hob 88. 2 H N Rp. 80. a. 240. a. 1 Bent 177. 2 Mod 309.

Again where one sues on a contract containing Reproscal. 1c independent contract, or promises, y Pltff need not aver performance of his covenants, but when dependent, he must aver performance.

Thus If a promises to pay money to B. in

in consideration of B's promise to deliver goods.
 B in suing need not aver Delivery: y action
 is brt on y Def's promise. But if A's promise
 was in consid^r of B's delivering, y count
 is dependent, and B in suing must aver
 delivery, y delivery being the precedent condition.
 1 Vent 177. 2 Mod 309. 5 Co 10. 1 Pow C. 359.
 4 Bac 18. Cro J. 654. Com B. 265. 3 Bac 187.
 1 Lev. 293. Hob 88. 2 N R 340. n.

Whenever previous notice to y def is y fact,
 on wh y right of action depends or is founded, y P^{ty}
 must aver it. Doug 671. Exceptions in y enacting
 clause of a St must always be negatived in suing
 on the St. But Exceptions in a separate, substantive
 clause, need not be.

In y former case. The Exception forms part of
 y description of the right. not so of y latter.

See Municipal Law. 43.

So Exceptions in the body of a count, must
 be & negatived in y action of count. But
 Exceptions in a distinct, substantive provision
 need not be.

11.

Certainty ante 6"

It is requisite, yt any declar^t shd contain
 certainty. This Rule applies to all Pleadings.
 It is necessary. First. For y Def to know what
 is averred. Second. For a general Issue to be formed.
 3^d for y Ct to know what to decide upon.

4th wh is "intra muros" y^o the def may
 be able to plead the Judgment in bar to any
 subsequent action for y same ~~offence~~ thing.

5 Co 35. 4 Burr 2400. 23 ac 22 B 1.

Co Litt 303. a.

The certainty required extends to Parties, time, place, and subject matter. Lawes 152. 7. 1 Inst 300. 5 Co 35. Cowp 683. 5 Com 27. 32. 4 Bac 8. Plow. 84. 122. Cro E 78. 97. 1 Vent 272. Co Litt 303. a.

The questions on this point have related chiefly to y subject matter. In describing the subject matter, however, y Law requires no greater certainty, y n y nature will reasonably admit. As a Brt an action of Trover vs B. for a certain ship and Sails, y was all y description given, but the Ct adjudged it sufficient.

So in Trover for books, y description stated only a "Library of Books." Yet this was held sufficient.

On the other hand, an action was brt for some fish and in the declarⁿ they were termed a "Lot of fish" "some fish" y was held "sufficient."

So again an action was brt for "2 sheaves of Corn." y was held to be insufficient.

Again "7 pieces of Linen" was held not to be a sufficient description. 5 Rum. 272. 5 Co 34. 2 S Low. 243. 2 Lunda 74. 5 Co 34. Cro E 817.

In applying y Rule of certainty, y subject must in general be refered to y good sense of y Ct. The Ct in modern times were more liberal, y n they formerly were in exacting certainty. 2 Lunda 74. n. 5 Ld Ray 588. 141a. Doug 315. 5 Co 34. 1st 637. Cro E 817. 5 Bac 272. Falk 628. Cro E 835. 2 Show 243. "Dicitur" to be satis, if the Jury can know from y description, what is meant. Cro E 817. 1 Vent 53. 5 Bac 195. b.

In alleging matter of Inducement, or aggravation,
y Rule is less strict, neither of these is y "Quo" of
y action, and is never traversable. Lawes 71.2.

118. Matter of Inducement, is yt wh is introductory
to y Principal or material subject. Lawes. 66.7.

Post 22. Matter of aggravation is yt wh shows y
circumstances of enormity, wh attended y action.

The loss and finding in "Trove" is but matter
of Inducement. In assault and Battery, threatening
words and Gestures are matter of aggravation.
The one is explanatory, y other additional tending
to enhance y damages. Lawes 72. 118. 66.7.

In case of "Tort" there may be circumstances of
aggravation wh wd increase the damages. In contract,
strictly speaking, there is no matter of aggravation.

But to return to y subject of "Certainty" There are
in y forms of Pleadings, certain words, continually
recurring, such as "said" "aforesaid" "before mentioned"
wh don't impart a satis degree of certainty if
there is more yn one antecedent to wh they refer.
and in such case, y word "first" shd be introduced.
8 T R 178. 2 East 66. 2 La Raym^d 888. - Cx

suppose there were 2 counties mentioned, and
the Expression was the "aforesaid county" yd wd
not be satis certain. To render it certain,
y Expression shd be "y first aforesaid" or "first
aforesaid" as the case might be. Com D. P. L.
C. 18. Co G 207.

A declaration may be ill in part for want of certainty,
and good for y Residue, even tho there be but one
count. As Suppose in y action of Covenant Broken,

two breaches are assigned, one sufficiently, & other not, he may recover on one, tho' not on the other.
2. Faund 373. 1 Falk 218. 1 Faund 286. n. Com. D.
Pl. C 33. Lawes 52. Post 22.

This Rule is "a fortiori" true, where there is more
y. n. one count. - Advantage cannot be regularly
taken of mistake, in the declaration, by Plea in
Abatement, but y. def shd demur. Post 325.
Falk 212. 20. 1. Bac 15. 1 How 9.

12. If one declares on a contract, w. y. validity of wh.
a deed is necessary by the C Law. y. deed must
be alleged, and he must describe it. So if one
pleads a Release, he must plead y. writing wh.
is necessary to the validity of the Release -
This is necessary by the Rule wh. requires each party
to plead what is essential to his cause of action
or defence.

Now By the C Law a deed is necessary to the
Transfer of an Incorporeal right. 6 Co 58. 43. b.
2 Miles 376. 12 Mod 54. Falk 579. B. N. P. 279.
Corps 289. 4 Bac. 656.

The Rule is y. same where a contract or conveyance
is pleaded wh. is unknown to the C Law. and
what is required by St Law. to be written.
He must then plead the Instrument, which
is y. foundation of the Claim - and admit wh. his
pleading is bad. as the writing is the essential
part of his case. Sid and Corps. 287.

But in declaring upon a contract wh. is good,
at C Law w. out writing, wh. is required by St.
to be in writing, he ant obliged to plead the

writing or mention it. but it will be sufficient,
if he ~~had~~ produce it in Evi, and tis altogether
unlayer like to do so. 1 Bac 75. 4 Mills 585.

3 Bulo. 1890. 12 Mod 540. Couk 289. Bul. 278.

Talk. on Selw. 519. Rob. & C. 202. 1 Root 77.

2 Iria 145. Post 102.

I suppose of Brant

In ye latter case, y writing required by St^a is not
an Instrument founding the action, but mere Evi
of the "Parol" ^{contract}, wh is y foundation. As it was
not necessary at C Law. to found y right, of
yt the contract shd be in writing, and as the
St requires it as mere Evi, y Rule of y C Law
still remains y same, for the St has introduced
no new & rule of Pleading, but has only
altered the Rule of Evi.

If however such an agreement be pleaded in Bar,
it must be averred to be in writing, because greater
strictness is now required in Pleas in Bar. y n
in declaring. For y plea in Bar acknowledges y
right of action in the Pltff. nⁱ yt right be taken
away by the Plea itself. Talk 519. Bull 279.
Ray. 450.

If in an action of contract within y Sc of Grand.
y def demurs to y declⁿ. y Ct will presume,
yt y contract declared upon, is in writing.

for by such demurrer, y def does, and must allow
yt there is such a writing, it stands confessed.
since y fact of demurring shuts out y Pltff from
producing Evi of y fact. (In an issue at Law no
Evi can be admitted) 7 T R. 357. 531. Talk 519.

Couk 289. 12 Mod 540. 1 Bac 74. 5.

The declaration may be either General or Special, and y difference consists in y generality or particularity of the Statement. It is general, for example, when y Plff in debt on Bond, sets out only the Penal part, but when he states y Particularity of y Bond, as y condition. &c. he makes a Special declaration. See ubi. B.1. Pleas &c 84. in doctrina plac-

A Plff in declaring upon a deed, is not bound to state any more of it. ym is necessary for him. to recover. A contract may contain various stipulations. A may covenant to pay B a sum of money in one, and in another, to convey certain Land.

Of These the Plff is bound to state only those on wh he sues. Doug. 642. * Def by Oyer may take advantage of ym.

In the action of "Assumpsit" it has been questioned, an y Particular word "Promise" is not necessary. But it has been very properly determined, y y words "agreed" is sufficient. It is extremely capacious to hold to any distinction between y words "Agreed" and "Promised" 2 N.R. 62. 3 Mass 160. Salk 603. 1 Lev 164. Id Ray 1517. Cro E. 913. see page 5. 2 Rule.

Of The Joinder of Parties in one declaration-

Plff.

When 2 or more persons are jointly interested in a right to be asserted by action, they may and regularly ought to join as Plff. If a promise is made to A and B, and broken, they must join as Plffs to enforce it, or y action will not lie on y promise. 1 Saund 153. 291. 5 Co 18. b. 19. a. Co Litt 164. 5 N.R. 657.

This is the Rule an y action is founded on

contract or Tort.

Formerly Joint Tenants, Coparceners, and Tenants in 13, common were required in all actions, relating to their Joint Estates, to join. This rule has been acknowledged by all hands, till lately. for y injury being Joint, y remedy shd be so too.

But it has been decided once in Eng., and once in the state of N York. yt such a joining is optional with them. either all may sue or one.

This Rule has been adopted, on account of its being more convenient. And all allow. yt y Rule was formerly otherwise. 12 East 61 57. 2 Cases 166.

This modern Rule of Eng and N York has always been the Rule in Court.

When y right violated, to be asserted by Suit, is vested in one individual only. another is not allowed to join. No one but y injured Party has a right to bring y action, and if others did, y def wd not be liable to ym. If y Rule were otherwise any man might be joined by all his neighbours.

It is impossible for one person who has y sole right of action, to join another with him, and enable him to recover, who has suffered no injury. Thus y action might go in favour of both y Jointees or neither. Cro E 143. 1 Leon 315.

The misjoinder in such a case may be taken advantage of under the General Issue. or it is Pleadable in abatement. Post 1 Lev. 315.
1 Com 13.

In an action by Executors as such, all (who are named in y will) must join as Pltfs. even tho one is under age, or shd refuse y office. 1 Saund 291. g. 1 Falk. 337. 960. Toll 446. Yelv. 130. Bent 95.

This is in accordance with y 1st general Rule. Their interest is joint. 9 Co 37.

If one Exr is omitted, his omission is pleadable in Abatement only, and if one Exr refuses to join, and don't appear. he must be summoned, and severed. Toll 446. Cro Ch 420. Cro E 512.

As a converse of y General Rule, if 2 or more persons several rights are violated, even by y same act. they cannot join. As If A by one discharge of a gun shd kill y horse of B and also y horse of C. B and C cannot join in an action vs A. They can bring separate actions.

Again if B I says A and B are both Thieves. they can't sue in a joint action, for their reputations are several and different. Cro E 512. Esp D. 524. Bac Ab. Pl. a b. 2 Bul 5. 2 Mch 427. 2 Saund 213. Owen 106. 1 Com. 195. Yelv. 124. 4 Bac. 511.

If there are 2 or more joint covenantees, obliges or Promisees, and one dies. Their entire right to sue at Law. survives with y other. i.e. remain to y other as Survivor. The Est of y deceased Co-obliges he can't be joined with him, for death has severed the Est right at Law. Tho before y death of either, they shd have joined in an action upon the Bond. &c. The survivor however is oblig'd to account with the Est, for y debt due to his

deceased to obligee. Same Rule holds with regard to Co-Creditors of any kind. 1 East 497. 1 B & P. 443. The "Jus accrescendi" vests y whole right in the Survivor.

If a contract is made with 2 persons, severally and their interests are several, each on his death transmits his interest to his Representatives. Same Rule holds, where 2 persons are interested Jointly and Severally. *Ibid*

Where y cause of action arises out of y joint act or default of 2 or more parties, they may ^{or may not} be joined as Defs. Where y cause of action arises "Ex contractu" they must be joined, but when "ex delicto" they may be either joined or severed as Defs. at y election of y party injured or party injured. For "Joint" may be Jo or Severale, but y violation of contract is Jo. only. 110b 6. Pack 262. Bac Ab. Pl. b 2. 3 BB. 117.

As to what is a "Joint" see "conspiracy" B & P. 5. 3 BB 117.

If 2 persons join in publishing a Libel, they may as Def be joined or severed 2 JR 199. 2 Burr. 988.

But where there are distinct "Joys" committed by different Persons in several acts, they cannot be joined, nor can 2 persons be joined in one action for "Joys" committed by them severally. As if A and B trespass at y same time on y land of C. they cannot be joined in an action for the Trespass.

Or if A and B shd at y same time and place say that C was a Thief. they cannot be joined in an action, because speaking is an act. wh 2 cannot join in. Tho' 2 may be joined in a Libel; "a fortiori" If one is injured by the

by the several acts of 2. or more persons at different times. They cannot be joined. Bac Ab. Pl. 8. 2

Palm. 313. Cro. Pl. 674. 1 B. & L. 15. 2 B. & L. 504. 2 B. & L. 90.
2 Fulk 393. 2 B. & L. 5. For 153. + Bac 10.

15. When 2 or more Persons are interested in a contract jointly and severally. They may be as defrs. joined or severed. at the Election of y Plt.

Seems by a Plt of N.Y. But if there were 4. for instance, 2 can't be sued wth y rest, for y wd be treating y contract as partly It and partly Several and there is no such contract known to y Law. 1 Yel. 26. 1 Sand 221. 3 J.R. 782. 3 Bac 697. Title abnagn. to Post 48. 1 Sid 238.

If 2 or more bind themselves by one contract, it is Joint, of course, in by y terms of y contract, it is Several. Thus if 2 or more make a promissory note "we promise to pay wth more, it is Joint only and not several. 3 Bac 677. 2 Atk. 31. Ch. B. 175. Burr 2611. 1 H Bl 236.

If 2 persons enter into a Joint Bond, and one dies, his Est is not liable at Law. to be joined wth y other obligor, in an action on the Bond. He can neither be sued alone, nor jointly with the Survivor. As it respects y creditor, his legal remedy is confined to y surviving debtor, but y Est is obliged to pay to y surviving debtor, what he has paid for y Testator. 1 East 400.

But if 2 or more Persons bind themselves Jointly and severally, y effect of the Several obligation is y same as if they bound themselves s distinctely. Here y Ex may be sued severally, but not Jointly. 1 Summ 271. 291. 1 Lev 161. 3 SR 557 Com D. Abr. 10. When an action is brought vs Execution, only those can be sued, who have accepted the Trust. But the Plff is bound to join all those, who are engaged in administering y Estate. Ibid. 1 Summ 299.

Of Joint causes of action

When several causes of action are of y same nature, and between y same Parties, they may be joined in one declaration. Each distinct cause of action must be alleged, however, in a distinct count. 1 Com b 244. Com D. act 9. 4 Bac Abr. Pl. l. 3. 4 Bac 11.

What is meant by actions of y same nature? Different actions are of y same nature, when they require at C Law. y same sort of Judgment. By y C Law in civil actions, there are 2 Judgments. The one is called a "Capiatur", y other a "Misericordia"

Whenever def is convicted at C Law. of a "Tort" committed "re et armis" y Judgment is a "Capiatur" i.e. let him be seized, and imprisoned, until he has paid his fine, for y breach of y king's Peace. On y other hand, when y Party is subjected for a contract, or a wrong not committed by force, y Judgment is a "misericordia" i.e. that he be amerced. Doug. 625. 652.

Now when there are several causes of action, all of y same nature, i.e. requiring a "Misericordia" or a

"Capitatur" between y same Parties, they may be joined, in y same declaration. But when different causes of action require different Judgmts at C Law. they cannot be joined in one declaration.
 5 Bac 191. Bac Ab. Pl. 6. 3. Feb. 177. Doug 642.
 2 Mills 239. 1 Bac 30.

Thus debt on Bond and debt on Simple Contract, may be joined in one declaration, in different counts however. 1 T R 276. 1 Mills 252. 319. 1 Vent 336. I think debt on Bond may be joined with a Promissory note. tho I've never met with an instance.

It is an elementary principle, yt there can be but one final Judgment rendered: and there is no Judgment known to the Law. wh unites these 2 species, hence y necessity of y last mentioned Rule.

The First, or affirmative Branch of y General Rule, tho generally true, is by no means universally true. It is true, however, yt when several causes of action require the same Judgment, and y same general Issue, and wh are between y same Parties, may always be joined.

When a sues on 2 or more bonds vs B, they are not only of y same nature, but require y same plea. "non est factum" and they may be joined in one declaration, in so many counts. 1 Mills 252. 2 Ibi 272. Salk. 10. 1 T R. 274.

Whenever Joinder is admitted, it is presumed, yt y Plff sues, and def is sued in one and y same right of action, character and capacity. Post 18. But where he sues in a different capacity, y above Rule don't hold. 3 T R. 347. 8.

For there wd be a Misjoinder of Counts, and I
 shd rather think, a misjoinder of Parties. Post 17. 18.
 as If y Pltff sues, or y def is sued in one count,
 in his own name, and capacity, and in another
 count, as Ex^t there is a Misjoinder 1. Wils 171. a.
 10 Mod 316. Talk 10. 1 SR 489. 3 Hob. 659

Our Books leave it as a doubtful point, an ^{an action} in 17.
 Joinder, and ass^t and Battery may be joined
 in one declaration. I conclude, they cannot from
 Rules peculiar to Joinder: and the fact, yt y
 nominal Pltff is not y real one, and the Real
 Pltff in Joinder will not, and cannot appear,
 upon the Record, to be y same person, as the Pltff
 in y other Count.

If this case is not an Exception to y last general Rule,
 wh perhaps strictly speaking, is not, then y Rule is
 universal. Hob 249. Bac ab. Pl. 43. 8 Co 7. 8. 3 Bl R.
 848. 1 Wils 252. 2 Id 319. 3 East 70. 1 Ventr. 223.
 3 SR. 347. 8. 4 Bac 12.

Mix regard to Trover. Trover and Glances may
 be joined in one declarⁿ. and to these may be
 added an action for malicious prosecution, in diff^t
 counts however. Doug. 625. Corp 230. 2 Bl R 848.
 8 Co 7. 8.

When different causes of action require y same Judgmt
 but different Pleadings, they may generally, but
 not universally, be joined. Thus debt and detinue
 may be joined in one declaration. So debt on
 Bond, and debt on Simple Contract, may be joined.
 The Reason is, yt by the C Law, y Judgmts are y
 same. tho y Pleadings are different.

To this Rule there are various Exceptions

An action of detinue has generally been considered as sounding in "Tort" D.G. thinks not. Cro E 20. 316. 1 Keb 147. 1 Vent 366. 4 Bac 11. Different causes of action, tho of y same nature, accruing to y same Person, but in different capacities, cannot be joined. Hob. 88. 10 Mod 316. Ford 196.

As one cannot sue in apt^e for money had and rec^d. in his own account, & an y account of another, as Est.

Here y Pltff claims in 2 different capacities. The Person is y same, y Capacities are different. The case is analogous to ^{of 2} rights of action, existing in favour of 2 distinct persons. In one, he sues as an Individual, in y other as Est. of a deceased person - y legal capacity is in 2 different persons. 1 SR 489. Talk 10. 3 SR 659. 4 Do 280. 1 Bet P. 217. 1 Mir 17. Carth 235. Sir 1271.

Money had and received to y use of y Pltff as Est. may be joined with one count for money had and received to y use of y Testator. The money belongs to y same fund, nominally 2 different capacities, but actually y same. 3 Est 104. 3 SR. 659.

On y other hand, y rule, yt "causes of action different in their natures, cannot be joined, is universal. Doug. 652. 2 Will 319.

Contracts and Trespasses cannot be joined, here y Indgmts and the General Issue, are both different. 1 Bac 30. Talk 10. 4 SR 347. 8.

18. Nor can ^{an action of} Trespass vi et armis be joined with ^{an action} ^{an action of} Trespass "Ex Delicti" much less ^{an action} ^{an action of} contract, here the Indgmts at & Law are different in Trespass "vi et armis" & "ex delicti" The Indgmt is different, but y Plea is y same.

There is an Exception to y affirmative branch of
y General Rule. Carth 196. 5 Mod 90. Bac Abr.
Pleas & b.ⁿ 3 Ray 233. 2 Mills 319. 1 Bent 366.
2 Burr 1114. 2 Lev. 101.

* Contracts and Torts of any kind can never be
joined in y same declaration, and yet in Torts
not committed with force, y Indgmt is y same,
but y General Issue is different. 1 Talk 10.
1 Bac 30.

Debt and account cannot be joined, tho'
requiring y same Indgmt. The Pleas and y
General Issue are different, and further y
proceedings are entirely different. 4 Bac 11. 1 Do 21.
1 Mod 42. An action of account can never be
joined with any other action whatever.

There are 2 Indgmts to be given in an action
of account. The Proceeding is "Trii generis"

An issue in debt is to be tried by a Jury,
whereas an action of account is to be tried before
Auditors. It is absolutely impossible to join
ym. y principal Issue is to be tried before 2
different forums. 1 Mod 42. Bac Ab. Pl. a. 3. 1 Bac
21. (1st quod computat.)

These Several Rules of Joinder may be comprised
under 3 following -

I. When y different causes of action require y same
Indgmts. and y same General Issue, they may be
joined with exception, provided y parties
are y same in both. and sue. and are
sued in y same capacity

II. In general 2 different causes of action, even

if y general Issues are different, may be joined, provided they require y same Judgmt. at C Law and y Parties are y same &c. This Rule however aint universal. The Exceptions are nearly as numerous as its application—

III. Where y Judgmts required by the C Law are different, they can never be joined. A Tortion when the Judgmts and General Issues are both different, they cannot be.

Where y causes of action are such, as in their natures may be joined, there may still be a misjoinder of counts. As Count ⁿ an adm^t for money, rec^d by him as such. Paied with a Count on a promise by Intestate. There is a misjoinder, for they require different Judgmts, the "de bonis propriis" y other de testatoris "bonis" 4 TR. 347. ante 10.

And Plf cant join a cause of action accruing in his own right, with one accruing as Est or adm^t in one declaration. 4 TR 380. 1 TR 489. Str 1271. 2 B et P. 7.

The improper joinder of several causes of action is called a Misjoinder of actions.

Post 99. A misjoinder is very different from duplicity
19. Mis often confounded with it. It is worse ym duplicity. It consists in improperly joining different causes of action. (as Pre stated) in different counts, to assert distinct substantive rights. To enforce distinct and different rights of Recovery.

A duplicity in a declaration, consists in joining different causes of action in one and y same count. to enforce an entire right of Recovery. Thus a Pltff in suing on a note of hand, shd insert in one count, y claim; and also, a charge of Fraud. Post 99.

The joining of several causes of action in one declⁿ wh according to these distinctions shd not be so joined, is an incurable fault. The def may safely demur or arrest the Judgment, or obtain a writ of Error. The Reason. why a misjoinder is fatal is this, in no action can there be but one final Judgment. - If then y Pltff obtain verdict on both counts. and claims Judgment on both. he can't have ym. for a Judgment adapted to one count, is not to y other. and y Ct have no right to select one Judgment, rather ym y other. 1 HL Bl 108. 1 Salk 10. Carth 436. 3 Lev 188. Str 43. 202. Carth 113. 4 Bac 11. La Ray 1032. 2 YR 166.

It has been a question an a declⁿ declaration for Trespass, wh asserts, yt y Def entered "in et armis" y Pltffs (As) house and beat his servant, whereby he lost their service, is a good declaration? It is now well settled, yt it is good, and yt y allegation of beating his servant, is to be regarded as mere matter of aggravation, attended upon y primary cause of action, so yt there is not in reality any Joinder. 3 Wils 20. 2 Ibia 313. 2 YR. 167. 3 Ibia 292. Salk 642. 1 H Bl 555. Bac Ab. Pl. b. 3. it is one continued act. *)

If y "per quod" &c. were omitted, y declarⁿ also wd be good. (*and y Ct will consider y whole charge, as containing only one entire cause of action,) but in such case any consequential damages arising from y Beating of his Servant. 2 Salk 402. might be made a substantive ground of recovery.

When there are several causes of action between y same Parties, wh admit of being joined in one declarⁿ. y Joining of ym is not imperative but optional, he may join or bring several actions.

In such a case however, y Ct may compel a Joinder. This is a discretionary proceeding. There is no Rule of Law requiring it, but where y causes are of y same nature, depending upon y same Ev they will order generally a consolidation. This is to prevent y def from being unnecessarily burdened with costs, and perhaps with a multiplicity of Suits. Comb. 204. 2 JR 639. 2 Str 1148. 1178. Comb. 244.

Where a consolidation is thus affected, y Plff must pay all y costs accruing from y application, because he is regarded as having moved y def. with unnecessary Suits, in order to make him cost.
1. Ch Pl. 196. 1 B et P. 287. 2 Str 77. 2 JR. 639
1 Ch P. 196.

According to later opinions, in cases of Mis Joinder, y Plff may be permitted to amend, by striking out one. 1 Saund 285. n. That wh is put out of y declaration is "Nol Pro." H Pl. 108. Before Demurrer, he may as to one, enter a "Nol Pro" and it seems now by the latter opinions, he may enter a "Nol pro" or amend by striking out

one after another.

The Rule was formerly, yt after y Misjoinder had been demurred to, y Plff cd not enter a Nol Pros" 1 Ld R 108. 4 YR. 347. 366. 1 Saund. 285.

The doctrine of Misjoinder has been stated to depend upon the diversity of Indgmts in Count. However there is neither "Capiatu" nor "Misencordia" and yet y Rules of Misjoinder obtain here, as elsewhere. They are necessary in order to preserve a distinction between y different causes of action.

In Eng. and in other States all Indgmts are y "Misencordia" 5 Bac 121. 3. 191.

Miscellaneous Rules.

The declaration must agree with y writ, for y declaration or rather writ is y foundation of all y subsequent processes. The writ commences y cause of action in general terms. The declⁿ amplifies upon it. The declⁿ must therefore agree with y writ, lest y writ express one cause of action, and y declⁿ another.

For instances when y writ entitles y action, "Gresbaf" y Plff cannot declare in "case" for yt wd be a fatal variance. Doct.⁹ Stud 84 one of y oldest books we have but of very good authority. Bac Abr. P.C. Pl. b. 4. Cro C. 325. Hob. 180. 4 Bac 12. 13.

The Rule of practice in Eng will not allow y def to take caption exceptions, vide "variance" When y declⁿ don't agree with y writ, & diversity is called a variance.

It has been said, yt those facts, wh constitute y "Gist" of y action, must be directly and positively

Again in declaring in affirmance, & consideration
 is a "Gist" and yet tis never ^{directly} distinctly, and positively,
 alledged. Again by the C Law, a man is liable for
 mischief done, by his animals, provided, he has
 previous notice of their bad habits. Yet a "Science
 or notice is never ^{directly} distinctly alledged, for it is
 not distinctly traversable, but is answered by the
 General Issue. "For y^e qualification I'm personally
 liable, as it aint so laid down in y^e text book;"
 for precedents 2. Ch. Pl. Hob 106. Cro E 201.
 Com L. Pl. G. 11. or 14. Bac Ab. Pl. B. 4. 4 Co 18. b.
 4 Bac 13. 14. 22. 3. 10 Co 77. Hob. 5. 18. Cro E 116.
 1 Saund 180. 179. For precedents, see Ch. Pafini,
 and Pleadings. Ap^o b. 9. 10. etc.

The Rule requiring material facts to be ^{directly} distinctly 22.
 alledged, does not hold with regard to Inducements.
 for these are not traversable. Pop h. 177. Yelr 170.
 Bac Pl. B. 4. Indeed they are not within y^e
 letter of y^e Rule, not being the "Gist" of y^e action

But y^e Rule dont hold, when a general Issue
 wont involve a denial of y^e material facts, in
 question, in wh cases, y^e facts must be stated,
 in direct and positive Terms. The facts must
 be distinctly traversable. Law. 72. 1. 118. 4 Bac 14. 13.

As In covenant broken, where there is a ^{1st suppose}
 condition precedent, ^{performance} it must be distinctly
 averred, for non est factum dont deny y^e fact, ^{of the conditⁿ}
 of performance. The averment of performance may ^{se must be}
 therefore be distinctly traversed, and for y^e reason, ^{se.}
 must be positive and direct

If y declaration is in part good and for any cause bad in part. and the def demurs to y whole, y Pltff may recover on the good part, provided y part contains a complete cause of action Hob 178. Cro. B. 104. 10 Co 115. ante 11. post 134.

Suppose Pltff sues in 2 bonds. and in 2 counts. and it appears. yt one was not due. when y Suit was commenced. and def demurs. Pltff may still recover. in y other Bond. Lawes 58.

Bac Ab. Pl. B. 6. 1 Saund 283. n. 2 Stria 379.
4 Bac 25. 6. Cro. B. 104. Hob 177. 1 Rolle 784. 5. 10. Co 115.
Yelv 145. 2 Ray 390. 2 Show 103. 2 Lawes 279.

The last Rule holds in all cases, where there are 2 counts. y one good. y other ill. Com D. C. 2. C 36. f 25. 9. 1 Saund 285. 6.

Suppose there are 2 counts for Slander, one for calling the Pltff a "Jelon" y other a "Dandy." he might recover upon one. tho not upon y other. for they are both of y same nature, tho not both true. The badness of one don't vitiate y other. There is no misjoinder, there is only an insufficient Count. in y same declaration with y sufficient one.

See a distinction in 11 Co 45. b. and Iurre to y reason. 1 Saund 285. 6. ante 9 Yelv. C. b. 259. 60. For there being one good count, there is of course one good cause of action stated in y decl^r. Therefore in Demurrer it must be adjudged good.

Where there are 2. counts. y one good and one ill, and def instead of demurring, plead y general Issue. and the Jury find a general verdict for y whole declarⁿ, y Pltff cannot have Judgment. - for Def may arrest it as y Ct wh is to render Judgment cannot

and does not know how much of y damages
was assessed on y good counts, and how much
on the bad. And y Ct will call a new Jury
and award damages on y good count only
10 Co 130. 2 Burr 985. 2 H Bl 318 Doug 686. or 731.
1 SR 508. 1 Aba 532. Ck & 316. 2 Saund 171. d.

The Ct of Error have altered this Rule, (quod minus)
deliberately and knowingly, but for what good
and satis reason I'm unaware. For y reason of y
Rule see Cro J. 104. H Bl 178. The Ct have no way
of determining, whether y verdict, when the "general
Verdict given on all y counts, is obtained
from y good or bad counts. So y Ct there shd
be a new Jury to award ~~new~~ damages on y good
counts. 2 Bac 7. 4 Do 572. Bul 5. 10 Co 130.
2 Saund 171. Cro E. 327. Cro Ch 206. 7. 327. 8. 3 Mil
177. Salk 384. 2 Burr 980. 2 H Bl 318. Cro 1004.
1 SR 508. 532. 2 St 1271. 1 Mil 171.

If y Jury find a verdict on both counts: separately
and assess damages upon each distinct one,
Judgmt on y good Count cannot be arrested.
The reason is perfectly obvious. The Ct know
how much was assessed on y good count
and how much on the bad one. Cro E 788.
1 Role 576. 1 Bul. 77. 1 SR. 508. 32. 2 Burr 980.
Salk 384. 3 Mil 177. Cro J. 104.

If the Jury dont find upon each count, but
it appears from the Record, how much is to be
found. Judgmt cannot be arrested. Cro J. 174.
Hob. 178. Thus If Pltff sues upon 2 bonds,
and in 2 counts, and the Jury return a
verdict of 1000 £, and it appears from the Record,
yt one of ym wasnt due, y Ct have

y arithmetical means of decreasing how much was given in y remaining count. 2 Saund 171. a.

Again if some of y facts alledged in one count, are actionable, and others are not, and a general verdict found, y Pltff is entitled to Judgment.

Suppose a person for instance, were to sue for words. "Felicit" "he is a felon, and a cheat" y first being actionable, y second not so. y general verdict wd hold. 2 Saund. 171. 1 Roll 876. Cro E. 328. 788.

2 Saund 71. 1 Roll 876. 1 Bait. 37

So if damages are separately assessed upon each count, in wh case Pltff may have Judgment for those assessed on y good count only. see Arrest of Judgment. 2 Burr. King and Cook.

ill. When a declaration is good in part, and in part if y good part does not contain a complete cause of action, y effect of it must be y same, as if it were ill in every part, and This I conceive must always be the case, when there is but one indivisible ground of claim, and yt ^{is} defective, or ill laid in any part: for in each case, y declⁿ don't show any complete right of Recovery 4 Bac 23. As Declⁿ in apuruit, y promise well laid; but y consideration not so.

Secus. in Trover for 2 things, one satis described and one not. for there are 2 distinct grounds of claim, of wh one is, sufficient cause of action-action.

24. If a Plea to y whole declaration is bad in part

it is in toto. Com & Pl. E 36. f. 25. 1 Saund 28.
and. nt 337. 2 Do. 49. Sel 312.

for an entire plea cannot be devised, as an
answer to y whole. if it is not in Law a defence
to y whole, it is no Legal defence at all.

If y Jury assess greater damages ym y Pltff.
demands. he may release the Surplus. and take
Judgment for y rest. 5 Bac 195. 272. 10 Co. 115.
Carth 19. 21. 2 Bac 223. 4 Abia 45 or 25. mod 28.
2 TR. 113. 123. 1 H Bl 243. Esp 204. Str 364.
Hara. 58. Post 139.

Or the Ct to prevent Error, may with a Release
give Judgment for the Residue only. 4 Bac 25.

But if Judgment is given for y whole, it is
Error. see Arrest of Judgment.

So if Pltff demand more, ym by his own showing,
is due. and the Jury find more. he may remit
y Excess. and take Judgment for y Residue
4 Bac 26. 1 Rolle 785. Str 175. 5 Bac 195.
272. Esp 304. 2 TR 113.

So after a Demurrer. 1 Saund 282. 5. nt.
For Exceptions to y Rule see 4 Bac Pl. E. 36.
7. mod 87. Talk 608. La Ray. 814. Deellⁿ when
arised by the Plea. is not bad. Com & Pl.
C. 85. E 37. 8 Co 120. a 7. Co. 215. Lawes 59.
ante 8. Post 32.

Dilatory Pleas.

25.

Formerly they were made witho any foundation
in truth, and merely for delay. 3 Bl 302. They
never affect y merits of y case in y least. By Str.

4. and 5th ^{anne} no dilatory pleas are accepted, yet are not accompanied with an affidavit, or some circumstances wh shd render ym. evidently proper and expedient 3 BL 302. 3 Wils 57. Bac Ab. f. 1. 2.

This It is confined to extrinsic facts. for if it appears on y face of y Instrument, y affidavit wd be unnecessary.

The first Dilatory Pleas are to y Jurisdiction of y Ct. y grounds for wh are various. The Plf^{or} may plead yt he is not liable to be tried or sued by such Ct.

In Eng. they have different gradations of attys assigned to different Cts. and ^{by} a good plea in Westminster hall. yt Plf is atty in another Ct.

If y atty is sued jointly with another, he cannot plead his privilege, he must, plead it in his own sole right. Cro C 580. Talk 546. Hob. 187. 177. 3 BL 301. Carth 11. Talk. 2. 4 Bac. 36.

It is a good Plea to y Jurisdiction, yt where y Ct is limited in its extent, y cause of action arose out of its limits. We have no Ct of this kind, in City Courts. By the Charter of y City of St. Haven, y Ct have a right to organize. Ct within certain limits. If y cause of action arose out of these limits, it wd be a good plea to the Jurisdiction of y Ct. 3 BL 301. 2 Burs. 207. Talk 544. Carth 11. 304. 4 Bac 36.

Again when y Ct. sued in, has no Jurisdiction as to y subjectmatter, it is a good plea to their Jurisdiction. When the Ct have no Jurisdiction

of y subjectmatter, it is impossible for y def
to waive ^{privilege} his Plea. He is under no
necessity of pleading y Jurisdiction at all, but
he may take y Exception, at any stage of y
proceeding. The Co on discovering it, are
bound to dismiss y cause. * The Consent of
both Parties cannot give y Co Jurisdiction.

Suppose an Indictment in a criminal case found,
and prosecuted in the Co of E B. (this Co having
no Jurisdiction in criminal cases,) if Judgment
were rendered, y proceedings afterwards wd be a
Trespass. 1 East 352. 10 Co 68. Vent 333. Bac Ab. P.
3. 2. B. 2. § 1. In fact tis not necessary to plead
y proceedings in this case, y whole proceedings
in this case, for y proceedings all of ym are
"Coram non Jure" and void. Fidd.

In an action yt was local, y fact yt it was brot 26.
in a wrong county, wd be a good Plea to y
Jurisdiction. When y action, however, is transitory,
it is no Plea, even tho it arose in a foreign country.

Suppose, A. brings an action at Westminster,
vs B. for a bond to be performed, in Philadelphia,
now A may allege, yt B owes on a Bond
to be performed in Philadelphia - & I. in a Bond
in y Parish of Mary Le bone, London. Ser 612. Corp.
161. 170. 181. 2 B. 1008. 2 H Bl 140. 161. 180 140.

La Ray 1532. 4 TR. 553.

Actions are Local in the following. Cases.

I Whenever a Judgment of a Ct. must be "in rem"
 i.e. where a Ct. applies directly to a property. All
 Real actions require a Judgment "in Rem" as
 an action of Gtment. Here a action must be bro't
 in a county where a land lies. Corp 161. 175.
 181. 2 H Bl 146. 161. Bac 34. Str 612. La Ray. 1532.
 2 Bl R. 1008. 2 Str 1612.

II. Criminal Prosecutions are Local. This follows
 from a fundamental principle of Jurisprudence -

An offence vs a land of one ^{state} cannot be considered
 as an offence vs the land of another. i.e. tho a same
 offence may be criminal by the laws of y^t State,
 yet a Ct cannot take cognizance of it, when
 committed in another. But Personal Civil actions
 in Penal Cts are not Local, by the C Law.

Obia - As regards different counties of a same State.
 Issues of Criminal -

III. Where a subject out of wh a cause of action
 arose, is local, a action itself is Local. As in
 an action of "Quare Clausum Fregit" For y^t is an action
 bro't for an injury done to the land, wh is Local.*
 2 East 880. 2 Bl 1008. Corp 161. 175. 81. 2 H Bl 140. 61. 2. 4 JR
 553. Str 646. * Tho a recovery is in damages, wh
 is not Local.

An action of Debt or Covenant Broken, vs an
 assignee of a Lease, is local. For a contract as
 between a assignor and the assignee, is annexed
 to the Reality. The Bond is local, with wh a
 land runs. and a lease is incidental to a Land.
 2 East 880. or 179. East 83. Tanna. 241. 6.

On y other hand, an action of Debt or Count Broken,
vs y original Lessee, is not Local. This is a Personal
contract. The Lessee agrees to pay the Lessor, so
much rent. 2 East 57. or 17. 1 Saund 241. 6 Mod 194
7 Co. 2. a. Liable on purity of contract. Moore 116.
Cro J. 375. Ass^t liable on purity of Estate.

A Plea to the Jurisdiction, is y first in y regular
order of Pleading. If an Exception to the Jurisdiction
may be taken, and is not, another Plea, not to
y Jurisdiction, waives the objection. The reason is
y^t def by preferring another subject, to y Jurisdiction,
tacitly waives the objection, he might have taken
to the Jurisdiction.

Each Ct has a right, has a right to decide upon
its own Jurisdiction, otherwise a Ct might be ousted
of all its Jurisdiction.

A Plea to the Jurisdiction must be signed by
the def. himself, and not his atty. for y Ct
supposes y^t the atty acts under the Ct, and by
its permission. Bac Ab. Pl. C. J. d. 2. 6 Mod. 146.
Lawes. 91. Co Litt 127. C. Hob. 164. 4 Bac 728. 35

On Count however, y atty may make y Plea and
sign it himself.

When y want of Jurisdiction, however, arises from y
subject matter, y def by ^{not} pleading the Jurisdiction
does not waive y objection, and cannot do it
in any way. For the Def certainly cannot give
y Ct y Jurisdiction, wh it has not, and y
proceedings are absolutely void.

As If an action of Real Property shd be brot
before the Kings Bench, in England. The
waiving objection to y Jurisdiction of y Ct, wd not

give yo to any additional right to bring a Suit.
The Plea to the Jurisdiction must conclude to y ~~my~~
Cognizance of y Co. y form is "whether y Co will
have any further cognizance of y Suit[#] &c" Bac Pl.
c.1. 3 Bl 303. 3 Mod 140. 6 Lawes. 109. Carth 303.
Falk 208. n. For the liability of a Plt who sues
in a Co not having Jurisdiction of y cause. see
"False Imprisonment" &c.

* S G Munkes y Co cannot award costs.

II. The second Dilatory Plea in y regular course -
or order of Pleadings, is the disability of y Plt.
Is a good Plea, & y Plt is under some legal
disability to prosecute y Suit. Litt 197. Co Litt 3. 128.
Bac Ab. outlaw. 3. Bac. 761. 2.

These distinctions are various.
disabilities -

I Outlawry - was never known in Conn.
Def cannot plead Outlawry as an Excuse, for then
it wd be an immunity, and not a Penalty.
Is a good plea however, to the disability of y Plt.
Moy 1. 1 Ga 60. 3 Bac 761. 2. 1 Ch. Pl 478. 1 Conn 6.
4 Bac 35.

If y disability of y Plt exists at y time of y cause
of action accruing, it destroys y Suit. Lawes 102. 3.
If not, it don't strictly abate the Suit, but is a
temporary impediment wh continues only, till y
~~time~~ Reversal or Pardon. ^{Thus} This def must plead
to y same writ. 4 Bac 35. Lawes. 102. 3. 4. 12 Mod
400.

But y disability extends to such suits only,
as are bro't in y Plt's own right, and not to those
he may bring in "after Droit" Co: or Exr.

3 Bac 672. Co Litt 128. a. But outlawry of Testator
may be pleaded to an action bro't by Exr &c.
For the Testator is y very person, whose right is

to be enforced by y action 1. Co 6. Lutto 1604.

Out Lawry is sometimes pleaded in Bar, and sometimes as a Dilatory Plea. If y cause of action is forfeited by the outlawry,* it may be pleaded in Bar. If not then y Plea is dilatory 5 Co 109. Co Lit 29. 128. a. 133. 4. Lawes 38. 104. *as it is in felony.

28.

II

Another Plea to y disability of y Plff., is "Excommunication" y only replication to it, is absolute.

It don't exist here. in N. S. Bac Ab. Excommuni. 2 Bac 319. Co Litt 133. 4. 8 Co 63. 96.

III. A third Plea to y disability of y Plff., is in some cases, "alienage". This is a Rule of national Policy, as it "ought to militate vs the Policy of y State or vs y subject of the State, to allow Aliens to hold Freehold. &c.

By the C Law. all persons born in a foreign country, wherever their Parents may be from, are Aliens. 1 Bac Ab. Alien. a. 3 Bb 366. 72. 4 JR 303. In Eng. modified by It.

By It in y country, y children of native citizens, tho born abroad, have all y rights of natural born citizens. Aliens naturalized At by y N. S. have y privileges of native citizens, with 4 exceptions.

Again children of naturalized persons, if resident in y N. S. and under age at y time of their fathers naturalization, have y privileges (in general) of native citizens. So N. S. Little Alien Act c. 8. 89. or 79. 69.

There are some offices, to wh a foreigner is never eligible.

An alien, if not naturalized can't maintain an action of a Real or mixed nature. By a Real action, is meant an action for recovery of Real Estate. By a mixed action, is meant an action both for Real and Personal property.

29. Alienage, therefore, is a good Plea to y disability of y Pltff in real or mixed actions - for an alien can't hold Real Estate. The general Rule extends to all Aliens, an enemies or Friends. Co Litt 261. 1 Bac 483. 70. 1 Com. 371. 2. 7. 2d S. 439. Coup 171 2 H Bl 162. Str 10. Pop'h. 36.

But alienage isn't pleadable to an alien Friend, if y action is Personal. And in some of y new States, aliens are permitted to hold Real Estate and of course ^{have} a right to maintain ^{an} Real Estate ^{an action} for.

This is allowed as an encouragement to emigration for y Str of y Several States, as they are briefly mentioned see Cambridge Encyclopaedia. article "Aliens"

An alien friend may also hold a Lease, for mercantile purposes, and for y benefit of Trade. Roll 194. Bac 48. Alien Pop'h. 36 Co Litt 2. 1. *This is a C. L. exception, to y General Rule and he may maintain Ejectment

30. With Alien Enemies, y Laws are more strict - for an Alien enemy can maintain no action at all. in our Cts. it is therefore a good Plea to y disability of y Pltff that he is an Alien Enemy. Manh In. 637. Str 1082. 1. B. et P. 103. 6 YR. 23. 49. Co Litt 129. Doug. 526. ~ 549. But his person is protected by the Law of Nations - Doug. 526. 49. Manh. 367. 7.

But a Suit may be sustained upon a Ransom Bill given to an alien Enemy, but not till y war is closed, and then he must recur to a Ct of Admiralty. This is an Exception to y general Rule. y^t no contract made with an alien Enemy, is good. 5 YR 23. Marsh Ins. 37. 432. 5. see "Contracty."

It is an Exception precisely upon y principle, y^t Treaties, Truces, capitulations &c are Exceptions. It is a part of y Law of Nations and y Suit can be held only before Privy Ct. Salk 46. 8 YR 166. Str 1082. Ld Ray 282. and by the St 26. Geo 3^d Ransom contracts by British subjects are forbid. Marsh. Ins. 43.

There is another Exception to y general Rule, an Alien residing under governmental safe conduct, may bring a Personal action, as a good Plea in Repl^t y^t he is under safe conduct Ld Ray. 282. Salk 46. 1 Bac 484. 8 YR 166. Str 1082.

When an alien wishes to hold Real Estate in any country, he can do by special act of y Legislature only. This is frequently done. Bac ab. Alien. Cro Ch. 142. 083.

It is undecided yet, an an alien enemy can maintain action as Est^t or adm^t. This subject is discussed Cro E 683 142. 1 Bac 84. but not decided. According to mine Judgmt. (and y mine too. I G) and y late decisions of national Law. I sh^d think not. for an alien enemy has no right to appear, in y country.

And shall he have a right to appear in Ct of Justice? and maintain intercourse with Citizens? Cro E 5. or 8. 7. Bac 84. # no correspondence can be between you - not even Relations -

An alien Friend may however, as best hold Lease of Land, or any Real Property, as if an Englishman having a Lease for 100. yrs. appoints an Executor American, & American may hold the Lease, as best of Law. it might be very dangerous to y heir.
1 Bac 84. 3 Co 50 & 5.

Popish If tis pleaded y^t P^lff is an alien enemy, & "Inimicus Reusque" in y^e def. in 182. or 182. n^o. 1 Bac Ab. Pl. f. 130. By the C Law. Popish recusancy, "Inimicus" attainder for Treason, or Felony, and that y^e P^lff has become a Monk, (forfeited, absolute) are disabilities and may be pleaded as such. 3 BC 30. 4 Do 380.

Attainder. Of those last mentioned disabilities, Attainder is only known in this country. Attainder is a disability in Eng. and even destroys y^e Inheritance. Bac Ab. Pl. f. 4. & Bac 36. 148.

Note. Quere has the Treason of y^e a State prescribed in y^e forfeiture of the Estate, even during his life? The consequences of Attainder are greatly qualified in y^e country by y^e Congress of y^e a State. The forfeiture extends only to the life of y^e offender. It doth cut off y^e widow's claim to Dower, or y^e children's inheritance. Constitution Art. 3. 3. 3.

Congress may regulate on Treason committed on the high Seas.

31. Coverture is also a disabling 3 TR. 631.

If an action is brought by a married woman in her own sole name, as a Single Sole, her coverture is a good plea, but when joined with y^e husband as Co P^lff. her disability ceases. 1 Bac P. F. 4. Co Litt 132. East 124. 1 BC 443. 3 TR. 64. 3 Ibid 631.

Lawyer. 108. 3 TR. 631.

Coverture in y Plff is pleadable only, ^{as} a dilatory Plea. and if y advantage ant taken of y disability in y way, y objection is waived: it cant be a plea to y action, as it dont deny her right to sue. but only questions y mode of suing.

Whatever can be taken advantage of, as a Dilatory Plea. (and if advantage is not taken of y disability) can never be taken advantage of at any subsequent stage of y Suit. It wd be unreasonable to allow y def to defeat y Suit in any subsequent proceedings, by an objection, wh he might have made at any "in Limine" * 6 IR. 766. 57. For Reasons see 3. de misnomer.

If a feme sole commence an action, and marries pending y Suit, her coverture is a disability to its continuance, for she, by her own act, disables herself to continue y Prosecution But this Rule is abrogated by St.th wh enacts. yt y husband having y marriage on Record, may appear as Co Plff. with his wife. 1 Bl 316. 1 Salk 2. 2 H Bl. 257. 4 Bac 39. 39 * This is a St of Court

Infancy. Another Plea to y disability of y Plff is, yt he suing alone, is an Infant. for an Infant not suing by Guardian, or next friends cant sue at all. The reason is, because an Infant is incompetent to make a valid power of atty. Every person, who appears by atty, is presumed to have given his atty such valid power. 3 Bl 301. 1 Role. 287. Co Litt 135. C. Calk. 123. 3 Bac 148. 2. Palm. 296.

If an infant sues alone, and Judgment is rendered, either for or vs him, it is Erroneous and may be reversed, by writ of Error. "Coram vobis", as it is called, and may be writ before a higher Court;

overruled, as it is not to be tried in fact.
 if not, it must be laid before y same Ct, praying
 him to reverse their own Judgment on y ground of
 y Infants disability. 2 Saund 221. 13. or 31. m.
 Cro E 424. Contra Cro E 44

By St. Dam. 1. Ch. 13. & 2 this rule is varied
 materially. It is enacted by that St, where an
 Infant sues alone, and recovers a verdict vs y Def.
 it is good, and cannot be reversed. in his infancy
 was pleaded, and overruled, but when it goes vs
 him. tis bad. Com D. Pl. G. 2. C. 1. § 2. Cro E 580.
 2 Saund 213.

And by St. Anne, y Rule is extended further,
 and if y Infant recovers by "Judgment", "confession",
 "Nil Dicit", or "non sum informatus" y Judgment
 is not erroneous. Ibid.

It is a good Plea to y disability of y Plff. y y
 person named as such, is not in Case. as if
 a shd institute an action in y name of a dead
 person: It wd be a good plea to y disability and
 if (y fact not being known) y Judgment shd be
 rendered for y Plff. it may be reversed by a
 writ of Error. "coram vobis" 3 Bb 301. Com D.

1 Mils 302. Lawes 104. 3. B. and B 44. Ch. Pl. 430.
 6. Storys Pl. 44 Com D. abt. 2. 16. Bac Ab. F.

It has been a question, an. y objection is not
 pleadable. in bar to y action, as well as by way
 of Dilatory Plea. I think, it may be taken as
 an Exception in Bar. for there can be no real
 cause of action in favour of a Person not in "Case".
 I have before said, yt Judgment if given for y
 Plff. wd be erroneous. and it is a Rule of
 whatever wd render y Judgment erroneous, may be

pleaded at any stage of y Suit Ibid.

Pleas to y disability shd always conclude with a reference to y person of y Plff, by praying the Ct to give Judgment on y said a. B shd be further answered. 3 Bb 303.

If however y disability is temporary, y conclusion is. yt y Plff may remain without day. &c " y however don't end y action. Tidds practice 585. Lawes. 103. 9.

The 3^d, and last class of Dilatory Pleas are called Pleas in Abatement.

Abatement.

All dilatory Pleas are sometimes called Pleas in Abatement, but not properly.

The meaning of abatement in Law. is prostration, demolition, or destruction. Thus to abate a writ, is to destroy it, to abate a nuisance &c. Co Litt 134. b. Bac. Ab. Pl. f. 1. 4 Bac 301.

There is a Minute, or material difference between dilatory Pleas and Pleas in abatement.

Pleas in abatement extend generally to y writ only. The defects of y counts are to be reached by different Pleas, and Pleas to y Jurisdiction of y Ct, and disability of y Plff, don't attack y writ. Story 60. Co Litt 134. Salk 208. Carth 172. 3 Lev. 351. 4. 3 Bb 301. 3. 1 Bac 101.

It is said yt no advantage whatever, can be taken of y declⁿ. by Pleas in abatement. Salk. 212. Miller 478. Lawes 172. 3 Lev. 223.

It is universally true, yt Pleas attacking y writ are Pleas in abatement. It is however universally true, yt Pleas in abatement extend 33.

only to y writ, for they may sometimes reach
a Count in y declⁿ. Story Pl. 60.

If there be a misnomer in y declⁿ, it is a good
cause for a Plea in abatement. If there be a variance
between y writ and declⁿ, y variance is pleaded
in abatement to y declⁿ. 3 Bac 624. 3 Bl 301. 4 Bac
800. 1 Bet P 647. 5 Mod 132. 44. Lawes 100. Com D.
act n. 12. Abatement 31. Story Pl. 60.

Again if there be a variance in y declⁿ, it is a
good cause for a plea in abatement. If there be
a variance between y declⁿ and writ, y variance
is pleaded in abatement to y declⁿ. 3 Bac 624.
2 Bl 301. 4 Bac 800. 1 Bet P. 647. 5 Mod 132. 44.
Lawes 100. Com D. act n. 12. abatement 31. Story-
Story Pl. 60.

Again if there be a variance between y Instrument
declared upon and y Instrument, itself, it may be
and must usually be pleaded in abatement.
Port 44.

But where there is a variance between y
Instrument and y description of it in y declⁿ
y Def^t ant bound to plead y variance in abatement,
but when presented, he may object to y admissibility
of it. on y ground of its not being y same
Instrument as set forth in y declⁿ. And this
is y way in wh y objection is most usually
taken in the Eng Ct. It is very clear. Then
y plea in abatement may go to y declⁿ
Com D. n. 12. abatement 8. 3 Bl 301. 5 Mod 132
Lawes 108. Falk 659. Port 44. Doctrina plac
1.

In y^e pleas of y^e description, y^e greatest certainty is required. The least inaccuracy is fatal. They must be precise to y^e greatest degree, for they are not like other Pleas, favoured by the Ct, as they don't go to y^e merits of y^e Suit, in question, their object being merely to defeat y^e Suit, by taking advantage of some formal mistake in matter of form.

10 Mod 208. 8. TR 167. 3 Bria 185. 5 ibid 487. 78
Com D. Abr. 1. n. 12. Lawes 55. 6. 157. 134. Err D.
82. 2 H Bl 330.

It is a general Rule, y^t every plea in abatement must give y^e Pl^y every better writ, i. e. it must be so pleaded as to enable the Pl^y to supply y^e defect, or avoid y^e mistake in a subsequent writ. Lawes 39. 102. 4 Ld Ray 1178. Com D. abat. I. 13. 182. see Exception Gely. 112. n. 1.

Hence in taking exceptions to a Misnomer, it isn't sufficient, y^t def aver, y^t y^e name contained in y^e writ, is not his name, but he must aver also his true name. So in a Plea in variance, y^e Def must show y^e variance, and y^e way in wh^{ch} it was produced. In short y^e Error and manner of correcting it, must be stated. Doctrina Plea. 11.

The causes or grounds of Pleas in Abatement, are numerous. They be either Intrinsic or Extrinsic. Lawes. 102.

II Misnomer.

34

Misnomer or want of addition in y^e Def is a good cause of abatement, an y^e misnomer be in y^e writ or deed. By Misnomer is here meant giving the def a wrong name. Hence tis good cause of abatement, y^t D. is sued as

Thomas Stiles - 1 Pallk 7. 3 Bl 302. Bac Abr. PL
 § 8. 3 East 167. Carth 14. 6 mod 5.

II The omission of y defs 'addition' is good ground
 of abatement. The word addition means his Title, estate,
 degree, trade, place of abode &c. To avoid
 mistakes, and for y purpose of identifying y Person,
 it is provided by St 1 Hen 5. y defs description
 be given in every writ. By y term addition, is not
 meant y Title merely, it includes his Title and
 much more. 3 Bl 302. 1. Mod 105.

It is not necessary at y day, to insert all
 these particulars; proper name, degree or profession
 and present or late place of abode, will be
 sufficient Ibid.

A modern Rule of practice has been however,
 in a great measure, destructive of y Plea for
 want of addition - at least so far as relates
 to y writ. For y def must show y deficiency, by
 procuring the writ, and he must get leave of y
 Ct to take y writ out of y proper office, ^{which} y
 Ct will not grant for such purpose. He
 must pray Oyer and state y purpose in his Plea.
 But y Ct won't give Oyer to raise a defence so
 odious to y Law. Lawes 97. 1 Ch. PL. 440.
 1 Saund 318. 3 Bet P. 390. East 383.

This St of Hen 5th requiring addition, extends to
 Personal actions, to Personal actions, appenly
 criminal and Indictments.

In Real actions, y Rule is "constat de persona"
 It is yt in Real actions, y description of
 y property, wch is y subject of dispute, and y
 defs. name is a sufficient Identification -
 Lawes 97. 7. East 383. 1 Ch. PL. 440. 3 Bet P. 370.

b. mod 85. 3 Bac 618. (* from y *posse*)

But at C Law. neither want of addition, nor misnomer. is pleadable to an Indictment for felony. For y appearance of y prisoner in Ct was supposed to identify him sufficiently. But the Ct of Ken. extends to Indictments for felony 2 How 186. Cro Ch. 114. 4 Bac Pl. f. 3. or 8. 1 Sid 40.

But y plea ed be of no Real advantage in criminal cases. to y prisoner. for in making it, he must give his Real name, and as a matter of course. y Ct will detain him, till another Indictment is framed. or found vs him by his true name. 1 How 248. 2 Ibrā 176. 238.

As want of "addition" is pleadable, so "a fortiori" + is a mistake in y addition so pleaded, or pleadable. y wd be more likely to create a variance yon y former. 3 Bl 302. Comb. 65. La Ray. 1814. 1 Com 28.

But y Rule. I conclude, is virtually abolished by y above mentioned Rule of y Ct.

In Real actions, no addition is necessary. in what is required by the C Law. wh required no addition, or unless y party sued, ranked as high as King or Knight 3 Bl 617. 2 Role 409 Com. 189. Talk 581.

In Count, y only necessary addition is, y def's place of abode. When however one is sued in an official representative capacity, y capacity or character in wh he is sued, must appear in his writ.

For being sued in an official capacity in many cases, he is liable only as an official character. 2 Vent 84. Carth 301. 2. Bac Ab. Pl abatement

Call and addⁿ must be sued as such, but y^e civil or representative capacity of a person, is not his addition. y^e is mentioned to identify y^e capacity in wh^{ch} he is sued, and not his Person.

But when any additions of this kind are wholly unnecessary y^e insertion of it is mere Embellishment.

It is entirely impertinent, when y^e capacity is not y^e Inducement of a tort y^e action. The heir when sued, must be specified as such, not by way of addition, but because such a description is necessary to show any cause of action Bac Ab. Heir. Co C. 33. 3. 2 Vent 84.

If 2 or more Defs are sued together, a Misnomer of one of ym. is not pleaable by y^e other, nor can y^e other take any advantage of it, whatever. If however it cause a variance, y^e other may take advantage of it. 3 Bac 126 -- 2 Hal 77

It has been a question, an if y^e writ abates as to one Def. it abates "in Toto" or only quoad y^e Def. 8 Co. 59. Carth 96. 3 Bac 520.

The question must depend upon y^e manner of bringing y^e action. If It. an abatement as to one, is an Abatement as to all, for they are sued jointly as but one Person, and the Law don't recognize ym. Separately. If Several or It and Several.

there is no objection as to y^e writ's continuing as to y^e rest: when it abates as to one, for in such case y^e Defs are independent of each other. 3 Bac 617. 8. Carth 96. 159. 6. Com 79.

473ac 45

In a plea of Misnomer, y^e def must not only say. yt y^e name averred, is not his name, but

he must state y^t a certain other name was ^{his at y^e} issuing
of y^e writ, and he must further deny, y^t he was
called or known by y^e name averred on. when y^e writ
issued. For y^e object of y^e Rule is, y^t y^e Pl^{ty} may avoid
future mistakes, and y^t y^e Judgment may not be
delayed by captious Exceptions. Talk 67. 2d Ray 118.
249. Mil^l 543. 4 Mod 374.

* by some authorities, y^t he was always known,
but J. G. Minter y^s useless.

In pleading Misnomer. Def must be careful in y^e
beginning of the Suit, not to admit he is rightly
named. If for instance, he is sued as C. D. comes
and defends 2 Saund 209. C. 1 Lilly 3 Eb. 2 Ch. Pl. 417.
480. or 418. Talk 67. 4 Mod 374. Car^l 124. 12. Re 766. 2 H. 731 247. 99.

If Misnomer as such ^{no} advantage can be taken
in by Plea in abatement, and if y^e def do it
notices it, as such, he waives his right; for
tis a Rule. he cannot assign for Error, what he
might have pleaded in abatement to y^e Suit.
Car^l 124. 1 Talk 2. 2 Com^b. 188. 6 TR 760. 2 H. Pl.
267. 99. 1 Bull. 216.

It is said, y^t if a Person executes a deed by a 87
wrong Sir name, he must be sued in y^e name,
and ~~the~~ must be taken out in it. When y^e is
y^e case, y^e right name, must come in under
an "Alias" 2^d Pl. 99. 267 - Str 1218. 1213. Co Litt 3.
3 Bac 617. 11. Dyer 213. 1 Bull. 216.

This however don't appear to me. to be y^e correct
method, he sh^d be sued by his right name,
with an averment y^t he executed y^e deed,
by a wrong name. for a person designated by a
wrong name, is not in Error. 3 Bac Abr. Pl. 7. 3.
3 Bac 618. 5 Co 43. Cro 897. Cro J. 558. 3 East 111.

If y action is upon a Specialty, he may be sued by y wrong name. for y Plff can allege, yt y Def is as well known by y wrong name as his right name. and Def is estopped from y denial by y production of y Instrument. Here there can be no need of an alias or averment, as there can be no variance quoad his name, for here 2 names are supposed. 1 Ch. 440.

Where one executes a deed by a wrong Christian name, and is sued by his right name only, y writ is bad, for there is a variance. Wilk 554.7. Cro E 697. n. Ch Pl. 440. Str 1218. 3 Bac 616. 2 Ch 53. Cro E 698. 2 East 111.

When y action is brot vs 2 or more Defs. y writ must designate y Def by all their proper names. Leach PL 340.

If then a Firm is sued, they must ^{not} be sued as A. B. C. & Co. but must all be sued by their proper names, and Company to be added, as "Merchants trading in Company" for y term "Company" is altogether too arbitrary. 85. R 848

On y other hand, when a Corporation is to be sued it must be done by its corporate name only. To sue y Individual Corporators wd avail nothing - for they are known to y Law - The Corporation has only an ideal capacity. Leach 244.0

1 Bl Corp^r. 1218. 38. 4 Bac. 38.

When a def is sued by a wrong name, it aint necessary that he shd take advantage of it for his own security. He may waive his right to abate y writ, and provided Indagmo goes vs him, he may plead it in bar to an action, brot for y same cause vs him by his true name.

Obid. Bac. Abr. Pl. f. 3. Dyer 1218. 373 ac 625. 5 ac 26

The practice in Court, when a Local Corporation as a Town, is sued, is to name y Select ^{men} name, Thus A. and B. De select^{men} ment of y town of A and y rest of y inhabitant^s of said town.

A misnomer of y Pltf may also be pleaded in Abatement and y Rules of Pleading are analogous to y misnomer of y def. East 542.

Misnomer
of
Pltf.

Tha y def misplead y misnomer of y Pltf. a a replication ^{to} y Pltf was known and called by as well by y name in wh he is ^{over}sued. is good.

But a wrong addition given to the Pltf. is no ground of Abatement, any further yn it was at C Law. The Pt Hen 5th. doth extend to Pltf. It is presumed yt y Pltf is known by the fact of his suing out y writ. The Rule at C Law. was. yt no addition was necessary under y degree of Knight b Mod 80. Comb 139. 581.
2 Role 469. 3 Bac 613. or 19. 17. 18.

In yo state, Court a wrong description of Pltf place of abode. is pleadable in Abatement, for y abode of Parties affects y Jurisdiction of y Suit. Et.

III Coverture - A Third cause of abatement is yt y Def being sued alone. is a feme covert. Coverture in a Def ^{sued} as feme sole is a good cause of Abatement -

But If a feme sole sued as def. marries pending y Suit, yo supervenient cause or marriage of hers can't defeat y Suit rightly commenced. Secus the might by her own act. defeat a Suit, regularly commenced as hers. Bac Abr. Pl. A. Ep D. 328.

Co Litt 132. 1 Ch. Pl. 437. 70. Carth 124. Str 81. 811.

La Ray 525. Cro J. 323. 10id 140

If a feme covert wd avail herself of her coverture as a defence, she must plead it in abatement, and not to y action. Or if she craves a General Imparlan^{ce}; she "ipso facto" waives all right to abate. ante 37. Post 57. Latch 24. 43 ac 29. 39.
* She must sign her own Plea in abatement for in y case she can't make or appoint an Atty. Chitty P 457. 70. 37. R 627. Corry D. C. F. 2. Coote 124.
2 Saa 209. 2. 64. 1. Chitty 415. 25.

When a female is sued upon a cov^t entered into by her during coverture, she may give her Coverture in Ev^d under y General Issue. for it aint to defeat y present Suit, for nonjoinder of y husband, but to show y contract to be utterly void * Continuance Latch 24. 4 Bac 29. 39.

If y wife shd neglect to plead her coverture, y husband may appear and plead it in bar. at any stage of y proceedings. Or if in consequence of her neglect, y Plt^y shd obtain a verdict or Judgment w^{ch} her. it may be reversed by writ of "Coram vobis" in favour of both Husband and wife. For tho y wife by her neglect, may forfeit her right to plead alone. she can't thus impair y marital rights of y husband. In this case y writ must be brot in y name of both Husband and wife, otherwise y writ is erroneous. 3 S. 2 631.
5 Doo81. Talk 400. Bac Abr. pl. b. 1 D2. 3 Esp. R. 10. 19. Post 57. 67. 72.

If a feme covert pleads her coverture, she must plead it herself and sign it herself 2 Saa 239^a. Talk 400. 2 Ch. Pl. 425. 3 Esp R. 15. 16. 19. Lawes 105. 108.

Again tis a good plea in abatement, y^t 2 persons sprung together, as husband and wife, are not in fact husband and wife. And e converso if 2 persons are sued as husband and wife who are not in fact ~~not~~ so. it may be pleaded in abatement. This however is not always y^e case, for in many instances, a husband "de facto" can sue. (But on what principle join as Plffs?) or be sued with his reputed wife, y^e same as if married. Semble. Comb 471. 3. 131. Bac. Ab. Baron and Feme. a. Co Litt 87. 105. 5 Co 33. b. 3 Bl. 427. 35. (B.G. thinks no severance in y^e Rule on principle)

Infants. But it aint a good plea in abatement y^t Def is an Infant. sued with a Guardian for an Infant is liable to be sued. with a Guardian. y^e Ct will allow ^{the Guardian} a reasonable time to appear and defend, if he has one. If not. y^e Ct will appoint one "ad Litem" Co Litt 89. 135. 3 Bl. 427. 5 Co 53. b. (case of a Lunatic, as y^t of an Infant) is the same I suppose)

Where an Infant is sued with a guardian, it is y^e Plffs concern and not y^e Infants. It is more important to him, for if Judgment goes vs him, (y^e Infant) he may obtain a writ of Error and reverse it. Cro P. 640. Plutt 92. Yels 56. 8. 10 Co 134. 2 Bac⁺ 218. 3 Bac 149. * Infancy and age. Title "Error."

IV

Another cause of abatement is y^e death of one of y^e parties "pendente Lite" at C^t Law. if a ^{sub.} Plff or Def dies, y^e Suit abated of course. ^{sole}
10 Co 134. Cro E 382. 4 Bac 401. 1 Com. 55. 6. 1 Bac 7.

100.
If on y death of one of y Parties "pendente Lite" final Judgment shd be rendered, twd be erroneous.

Death
of
Party.

The Error wd be extrinsic, for y Ct to have pronounced Judgment, must be supposed to have been ignorant of y death. And y writ of Error in personal actions, must be brot by or vs y Ex^r & of y deceased party, as y case may be. Ray. 59. Bac Pl. f. 4. Co Litt 139. Carth 338. 9. Ord 2982
* as the Plea in Real) 1600 184.

If a writ of Error shd be brot, averring y one of y Parties, was dead, when he was not, it is y duty of y Shff to bring in y fact, and y person of y Plt^f may appear as Def^t in y writ of Error, as vs his own Ex^r. He may plead "in nulla est erratum" at C Law, y Rule is y same, an there be one or several Plt^fs Carth 339

If one of several Plt^fs dies, y writ will abate, in there has been a summons and severance. y reason is, y writ asserts a Pl^t right, wh by y death of one of ym is destroyed. The only Exception to y Rule. viz in case of Personal actions, after a Summons and Severance. As A and B have a Pl^t right to sue, and A sues alone in y name of both, now if B don't appear at y Trial, A may have a summons for him, and if then B does n't appear in answer to y Summons, y Ct will award a Judgment, and Severance, after wh Judgment, if B die, y writ will not abate, for B is no longer a Party to y writ. 6 Co 26. 10. Co 134. 1. Bac. 78. Doct Plac. intro - 1602 184.

Personal
Actions -

But if one of several def^s dies "pendente Lite"
y Rule at C Law is general^d yt y Suit shall
not abate. In such case y Rule at C Law is,
yt y Plff make a suggestion on Record, of y death
of one def. and proceed vs y other. 1 Bac 8. 1 Show
186. 3 Mod 249

The reason, ^{wh} y suit don't abate is, yt they
don't assert O^r claims, y fact yt 2 or more
Def^s are sued, together, doesn't imply a O^r claim
or concern in it. They need not defend jointly—
one may be ultimately liable, and y other not.
The Ponder may have been altogether accidental.

41. If however y cause of action wd not survive vs
y Surviving debtor, y action, I conceive, must abate.
Ibid.

By y St^d Ch. 2^d (17th) and 8. and 9. Mm 3^d
and similar ones in y^s country, y inconvenienc attending
abatement in case of y death of one of y Parties,
is greatly remedied. as 1st where one of y Several
Plffs dies, "pendente Lite" y suit doesn't abate.
provided y cause of action survives in y Person
of y Surviving Plff. This will happen very generally,
where y action is rightly commenced. 2 Mod 115.
4 Bac 42.

On y other hand, where one of y Several Defs. dies,
"pendente Lite", y action don't abate, provided it
survives vs the Survivor. 2 Mod 115 18 hoc 186. 173 uo 5. 4 Bac 42

2^d If a Sole Plff. dies, "pendente Lite" y Suit will
not abate, provided y cause of action is such,
as wd survive to his Representatives. On y other
hand, if a Sole Def dies, "pendente Lite" y
action will not abate. 4 Bac 42.

In England, y death must have happened, after some Interlocutory Judgment, in order to give effect to y Rule. By this Interlocutory Judgment, is meant, y Judgment on y writ of Enquiry of damages, to be awarded. 4 T.R. 431. The Term then used. Same Rule holds as to a Sole Def. 2 Mod 115. Bac Ab. pl. A. 5. 6 Mod 144. Sole Exr 442.3. Lilly, Entr. 647. in house 124. Generally any Judgment not Final, is interlocutory—

The Jo of Count on y subject, has no reference to Interlocutory Judgment. To enable y Representative to sue, y action must survive in wh case death produces no abatement. But If either of y Parties die after y verdict, but before Judgment, y action won't abate. Judgment will be rendered. Tulk 42. Lilly Entr. 647. 442. 182. 535

This is virtually a Judgment "quæ pro tunc"
It is y same as if rendered at y moment of verdict.
Sole 442. 3 Tulk 42. 1 Sid 335.

The method of proceeding is vs. When one of several Pltfs dies, his death is barely suggested 42. on y Record, and y Surviving pltfs proceed, as if y right of action was originally vested in ym alone.

So when a Sole Plt dies, if y cause of action survive, his Exr by entering his name as Exr on y Record, and suggesting y death of his Testator, may continue y Suit. But when a Sole def dies, y Plt must take out a Sci Facias vs his Exr and to appear and show cause, if he has any, why y Suit shd not be continued, and Judgment awarded vs him as Exr of y deceased. 442. 4. 5. 442.

If there be 2 Pltfs, A and B. Now If A die, "pendente Lite" y action survives to B. as we have seen, (ante) but further, if B shd die before y

There is a mode of setting aside y proceedings in y case. By motion for irregularity, as in y case of a writ in bailable process, and decl^r is only one.

The Ct will not grant oyer of a writ to enable def to plead a variance. (J.G. thinks where y variance is not material) If then there is a variance between y Instrument declared upon, and y description of it in y declaration, it may be pleaded in abatement. Talk^r 59. Com D. Ab. n^o 12. 1. B et R. 82. Doctrina de 1.

Advantage may be taken of such a variance in several different ways. The most usual mode in Westminster Hall, is by objecting to its admissibility in Cui, or after its admission, by objecting, y^t it don't support y decl^r, and thus works a "Non Suit"

1 PR 656. 4 Ird 612. 1 Saund. 154. Doug 208. 640.

1 B et P. 7. 4 IR 612. 0878 Cowp. 766. 7

In Eng. it usually works a Non Suit. In Court. advantage is usually taken of it by Plea in Abatement.

There are 4. different modes, by wh advantage may be taken of a variance. 1. by Abatement. 2^d By objecting to its admission in Cui, wh will work a Non Suit. 3^d By objecting under y General Issue, y^t it does not support y decl^r. 4. th By rejecting it "verbatim" upon y Record, and then demurring to y declaration 1. Saund 317. Com D. P. Q 3. 2 Nils 339. 4 IR 612. Bull 213. 2 It 1146. Hob. 18. Doug. 208. 13.

"ante 33" 402 18

There is no objection to y declaration on y face, of it. Now then, can Def demur? The Instrument when cited on y Record, is thus made part of y decl^r itself - tis y same as if P^lf himself

recited it. In practical Language, y Pltf has asserted, yt a certain Instrument is not, what it really is. The def then says, "you have stated a certain Instrument to be thus, wh y Record contradicts. Kirby 106.7. Not Law Ibid.

No advantage can be taken of a Misnomer, as such, ni by plea in abatement, but when it occasion a variance, advantage may be taken of it in either of y modes last mentioned. But in so doing, it is not regarded as misnomer, but as a variance. ante 36. 4 SR 612.

Thus if D. is sued as J. upon a Bond he may admit his name to be J. and then say yt y bond executed by J. is not y one declared upon.

Non D Mis Joinder VI Another ground of abatement, is y Non or Mis Joinder of Parties.

Of one person sues alone, when another person ought to have been joined, y ^{non} Mis Joinder is always pleadable in Abatement. Co Litt 164. a. 189. a. 195 b. 198. a. Talk 4. 7. SR 243. 1 Lamma 291. k.

In y case supposed, y Pltf has no right of action as Sole Pltf. The right sh^d be Joint and be exercised Jointly - enforced

On y other hand where several Persons bring an action Jointly, when y right of action is vested in one merely. y Mis Joinder is pleadable in Abatement. Cro E 143. 1 Leon. 315. Hob 72. 1 Com 13. 1 Roll 294.

This Rule is universal. Such a Mis Joinder may in every possible case be pleaded in Abatement. There are also some cases in wh.

advantage may be taken of it under y general Issue. In other. only in Abatement, and in other still advantage may be taken of it by way of Demurrer.

When or where an objection arises from y Mis Joinder on Non Joinder, to a Suit, if y objection involves a denial of y declarⁿ, or any material allegation in it, advantage may be taken advantage of it in any of y before mentioned methods: for whatever goes in y denial of y Pltfs allegations, is in support of y General Issue. 2 Str 820. 1 B. et P 75. Pea 203.5 Bul A P. 172. 2 YR 283.2.

Thus if in an action on contract, one sues alone, when y right of action is in Several, Def may take advantage of y Error. under y General Issue, or byoyer and Demurrer. or he may plead it in abatement.

Where y fact of y action being brot by one, goes in denial of y declarⁿ. The declarⁿ alleges, yt y Def promised y Pltf so much. The def may say under y General Issue, yt he didnt promise y Pltf, but y Pltf and another Person. 1. B. et P. 75. 176. 2 Str 820. Pea Cr 205. 2 YR. 282. Rule 153. 1 Saund 291. f. 9. 1 B. et P. 76

In these Examples, it is supposed, yt y Contract was in writing, foroyer ed not be had of a Parol Agreement.

If in an action on contract, one sues alone, when y right is in 2. or vice versa. and y s appear in y declarⁿ, y mistake is fatal, and will not be aided, even by a verdict, when y fact appears in y declarⁿ, it never can be cured. 5 Co 86. a. 1. B. et P 67. 1 Saund. 157. 201

On y other hand, if one brings an action sounding in "Tort" where y right of action is in 2 or more, and it even appears on y face of y declⁿ it can only be pleaded in abatement. Suppose D has committed a Trespass upon y Joint property of A and B, and A alone sues D for y Trespass. Now y Nonjoinder can only be pleaded in Abatement.

The declⁿ alleges, yt D trespassed upon y land of A. The fact, yt it was also y land of B, does not deny y declⁿ, and therefore don't strengthen y General Issue, 6 T.R. 766. 1 Saund 91. Falk 232, 196. Str 326. 1146. 5 T.R. 649. 5 East 407. 2 D. & C. 20. 1146.

Thus if A and B being Jo Tenants, A alone sues for Trespass. The declⁿ alleges yt C trespassed on y land of A. y fact, yt it was also y land of B, doesn't deny y declⁿ, and therefore will not strengthen y general Issue.

Where y objection, arising from Non or misjoinder, does not go in denial of y declⁿ, advantage can be taken of y mistake in abatement 5 East 409. Pea 200. In y case mentioned above, however B may show under y general Issue, y Interest of B in order to diminish y damages.

On y other hand, if 2 persons sue together in an action sounding in "Tort", when y right is in one only, advantage may be taken of it, either under y General Issue, or in abatement. Here y objection goes in denial of y declⁿ.

As if A and B sue C for Trespass, when C trespassed on A only. Cro 143. 5 Bae 200.

If one part owner, sue alone for a "Tort" and
 y def don't plead y Nonjoinder of y other in abatement,
 y other part owner may bring an action, for his
 share of y damages. For y def by not pleading
 y Nonjoinder, has virtually admitted their right
 to sue alone. 4 I.R. 479. 1 E.R. 16. 2 I.R. 586. 622.

But where one partner, ^{who} has withdrawn his
 name from y firm, receives part of y profits.
 there is no necessity for joining ^{him} in y action.
 tho he is liable for Company debts. E.R. 408.
 Dec 27.

Nonjoinder &c of Def^s in Contract and Tort
 If one of 2 parties is sued alone on contract,
 y ^{non}misjoinder of y other must be pleaded in
 abatement, in it appears on y declⁿ or other
 Pleadings, yt there is another ^{be} joined. 2 B.L.R. 947.
 5 I.R. 657. 1 Saund. or Lawes 291. 5 Co 119. 2 N.R. 365.
 1 I.R. 236. Salk 444 not Law. 5 Burr 2411. 6 T.R. 62; 2
 Debtors

Suppose A and B are Trespassers in a
 contract, and yt A is sued alone. If he wishes
 to avail him of y ^{non}misjoinder, he must plead
 it in abatement.

The Reason is, yt y fact yt another person was
 joined with him in contracting, does not prove,
 yt he does not contract. It don't therefore
 deny y declⁿ, and of course consequently don't
 strengthen y General Issue.

On actions "ex quasi contractu" y Nonjoinder 48.
 of another, as Def, if pleadable at all, is only
 pleadable in abatement. According to modern
opinion, it isn't pleadable at all.

1 Saund 291. 6 I.R. 369. Carth 62.3. 2 N.R. 365.
Contra Salk 440. not Law.

Actions "*Ex quasi contractu*" are those compounded
 "of Tort and contract" Suppose an action brought as
 a common carrier, whereby the Plt has lost
 his goods. 3 East 67. 62. 70. 5 TR. 648. 5 Bac. 267.
 192. *Tauna* 291. (18.th contract y inducement and
 Tort y gist)

This was olim considered as "Tort" founded
 on breach of contract, but is now considered
 as sounding solely in "Tort" - and they need
 not be joined - Torts are several -

It appears, then, y^t in actions on contract,
 y^t if one of 2 defs is sued alone, he may plead
 it in abatement, but not under y General
 Issue.

49.

If in an action on a contract, y Suit is abated,
 and destroyed, and another action is brought w^y
 Def disclosed in y former, he may plead,
 y^t there is still another, and so till y whole
 is disclosed. 3 East 701. 5 Co 119. 1 Bet P. 72.

As if A, B, and C are sued alone when
 jointly interested, A may then plead y^t B
 is not joined. If then A and B are sued,
 they may plead y^t C ant joined. If then D
 1 Burr 2614.

But he, who has in a Suit pleaded, y^t another
 def ought to be joined, and when such def
 is joined, he who first pleaded, cannot be
 admitted to Plead, in Abatement, y second time.
 But if it appear by the Pleading of y Plt -
 y^t another ought to be joined, y def may plead
 in Abatement, or take advantage of it under
 y general Issue. 5 Burr 2614. 5 TR. 769. 1 *Tauna*
 291. B. and C.

If y ^{now} mis Joinder appears on y decl^r, and yt y person was "in Ess^e" y omission is inevitable, and cannot be aided even by verdict. *Ibid.*

On y other hand, if one brings an action, sounding "in Tort" when y right of action is in 2 or more, and it appears in y decl^r, it can only be pleaded in abatement. In y^s case, "a fortiori" y decl^r wd be demurrable.

If 2 persons are sued on a contract, made by one only, advantage of y^s may be taken of y^s under y General Issue. For y objection arising from y mis Joinder, denies y decl^r, and of course supports the General Issue.

As A and B being sued on a contract, when A alone promised. 1 East 48. 2 N R 454. 3 East 192. 2 Day 272 (There is a variance. *East 301.*)

This fact is in denial of y decl^r. y^{re} wd be no need of pleading in abatement, if it were admissible. I doubt however, an it wd be admissible. [#] Phillep & Battel.

If an action is b^{rt} on contract vs 2 persons, where y contract was really made by one only, y Plt^f can't obtain Indgmt vs either. Carth 361. 3 East 162. 1 Keb 284. 5 Cb 47. The verdict of y Jury will state y fact, yt one made it, but that both didn't. and in y^s case, it is impossible for y Plt^f to avoid y objection, by entering a "Nol Pros" vs y other. for if he enters a "Nol Pros" vs one, when y action was b^{rt} vs 2, he disposes himself. This wd change an action vs 2 into an action vs one.

On y other hand, if 2 persons are sued for a "Tort" which was committed by one of them only.

y Misjoinder cannot be pleaded in abatement,

see 12 Str 509. 333. 2 B 336. 8 Co 157. 9. Str 420, for in an action of "Quare Clausum Regit" brought vs A and B.

when committed by A alone, A may be convicted and B acquitted. In Torts. Where A is supposed to be no Non or misjoinder - Contracts are Joint as to Defs only. Com m. 9. 3.

In cases of Torts committed by several, one may be sued alone, or any or all together - 3 B 112.

There is however one Exception to y General Rule. It is in cases of Tort arising out of Real Property, and from their Joint Interest - and y is y only Exception. 1 Ch. Pl 70. 5. 5 T R. 657. 1 Lawes on Torts 291. C. 2 East 574. 2 B 182. See 291. 2. Comy D. a. 1. 6.

Suppose A and B. Joint Tenants, are bound for their Joint Tenancy, to keep up a certain watercourse, but thro their negligence, it overflows y Land of another, he, in bringing an action of "Tort" must bring it vs both. I G. don't see, why Joint Tenants shd vary the Rule.

When y Non or Misjoinder goes to y denial of y declr, it may be pleaded either by abatement or under y general Issue.

of a joint Cause of abatement is y Pendency of a Suit for y same action or cause of action, and between y same Parties. 1 B 13. 19. 5 Co 61. a. b. 4 Co 43. This is to prevent vexatious Suits.

If there is a single cause of action between y same parties -
 One Suit is sufficient for y purpose of Justice -
 The Law abhors a multiplicity of Suits - This Rule,
 don't hold however. in both Suits are of y same
 kind, or at least concurrent, and y cause of action
 y same. They must both be by y forms of Law
 adapted to y cause of action. 5 Co 61. a b. Hob 184.
 4 Co 43. a 1 Com. 149. 50.

In actions for Trespass for taking goods, y pendency
 of a former one in ^{the y remembrance} ~~Trove~~ will abate it, for they
 are concurrent. Hob. 184.

but

Both tho' all y actions originate in one and y
 same transaction, yet if y cause of action is not
 specifically y same in both, y pendency of both
 Suits is not cause of Abatement -

The suit is considered as pending from y time
 of y writs issuing - 1 Bac 41. 2 Hawk. 275. Folio
 Cro E 677. Cro D. M. 5 Co 48. 3 Burr. 1423. 1 Root
 485. Talk 39. 7. Co 30. a. Comp 452. 2 BB 273.

second

It is not indispensable to y abatement of y, Suit 50.

yt y first Suit be pending at y time of y
 Abatement Doc. Plac. 10. 4 Bac 48. As a has
 an action commenced yesterday vs B. and today
 commences another for y same cause, and tomorrow
 withdraws y first suit, y second is vexatious
 "ab initio" If however, it appears, at y time of
 commencing the first Second Suit, y first must
 be wholly ineffectual in consequence of any
 mistake, y Second. Tho' b't for y same cause,
 will not abate. 1 Root 384. 562. 4. Cal 286. 52

As in an action, where Trover & only will lie, y
 Plt' brings an action of Trespass. Hence a
 second action b't, pending y first, isn't abated
 So settled. Sub. Co of Com. 1 Root 365. 562.

The first is considered as pending from y time of y writ first issuing. 1. Bac 41. Cro E 677. Cro E 111.
5 Co 48.

The pendency of a prior action will never abate a subsequent one, in it is vexatious, and it always is so, when what is recoverable by y Second, can also be recovered by the First.

57. Again y plea will ⁺not ⁺avail, even tho' there
+ new shd not be a new def added in the second suit,
"not" be omitted? The Rule appears to be, yt y second action will
abate for both Defs. I think however y second
shd abate only for y Def common to both. The
weight of authority is, yt it will abate in "Toto"
1 Root 155. Bac Mr. Fill. Hob 137. Carr 96.7. 1 Show
71. (Luttrell 42) (Contra 1 Root 155.

1 Carr 96.7.

On y other hand, if one of y defs mentioned
in y 1st is omitted in y second, y is clearly
vexatious, and y second action will abate
in "Toto." Obid Carr 96.7. 1 Bac 13.4. No 137.

2. 72 ac 47.

But if it shd appear, yt y first may be defeat
for non or MisPinder, wd y second abate?

There is a class of cases, to wh neither of these last
rules will apply. I refer to action on contract
where there is non or MisPinder in y first.

Gill C. R. 260. 47 Bac 49. 110 14.

If a second Suit is commenced on y same day,
yt y first is abated, y second will be supposed
to commence after y abatement of y first.

In Law there is no fraction of a day.

Allen 34. Gill Eri 260. Bac Mr. R. 11. There can
yo presumption be rebutted?

It is no cause of abatement, yt another action
is pending for y same cause, in 2^d favor, in
a Stranger In 420. 1 Com 50. Hob 137. 8. The def

if one writ has nothing to do with y other.
 There is no vacation here. - The Rule is y same. where
 there are Jo and several debtors - The action may
 be bro't vs ym all. Bills of Ex. All Parties may
 be sued at y same time. Str. 420. Hob. 137. 8.

It is no ground to abate an Indictment, yt a
 prior Indictment is pending for y same offence,
 for y Ct have y power to quash either of ym -
 and according to discretion, will regularly do it -

Specs of Informations and Appeals. 2 Hawk 190
 275. 367. 1 Bac 13. 4 Ibid 48.

If 2 Informations shd be offered at y same day. 52.
 by different persons. each will abate y other -
 and no final Judgment can be rendered on
 either - I doubt y principle of y^s Rule -
 1 Com Little Abatement - Hob 128. Moon. 864. 85
 3 Burr 1334. Contra.

In my view there is nothing to hinder a collusion
 between an information and a friend of y Prisoner.
 wh shd destroy y effect of y Information, and
 y^s might be repeated, and carried "ad Infinitum"
 This is however y Rule laid down - but it seems
 to me (I G.) very dangerous. It wd tend to
 defeat public Justice

8th Cause of Abatement, is yt y writ was
 unduly issued - So also is any Informality
 in y writ - But there are defects in a writ
 wh will render it absolutely void - Com. D.
Abatement H. 1. Lawes. 116. 106.

If y writ is made returnable to any other Term,
 ym y next succeeding Term of y Ct, yt writ is

void - provided there is sufficient time intervening
for Service & Legal proceedings 1 Root 315. 16. 2 Salk
700 3 Mils 341. (# and those acting under it, act
at their Peril.)

The reason is, y^e otherwise y^e def might Evidently
be imprisoned, or held to Bail for any indefinite
Period - 1 Root 315. 15. For he cd take no advantage
till y^e Return, nor wd any one give Bail.

If y^e writ is issued by Incompetent authority, it
is utterly void, for a writ issued by any one
without proper authority, in Law is nothing more
y^en Blank Paper. 2 Inst 83. 1 Lev 2. Cro E 592.
4 Bac 43. 8. 1 Com 46. 1 Will 304

There are also errors, wh^{ch} render y^e writ only defective
but not void. It abatable -

If a writ has been defectively returned, it may
writ have be pleaded in Abatement - A defect in Return is
no date or y^e want of sufficient time between y^e date of y^e
in impossible writ and y^e Return day -

date or future

date, tis The Interval allowed in Eng. between y^e date of y^e
good cause writ and y^e Return day, is 15. days. If then y^e
of abatement Shff has returned it 14 days after y^e date,
a false date y^e writ is defective -

may be
corrected

Such defect may be pleaded in Abatement,
but if not taken advantage of, in Abatement -
y^e Error is waived Cro E 50. 1 Salk 63. 2 Rolle 401.
1 Sid 400. 2 Keb 411.

53.

A defective Service of y^e writ, if it appears on y^e
face of it, is also good ground of Abatement,
at C Law. But by the C Law, if y^e writ, tho'
defective in fact, or point of fact, appears satis
on y^e face of it, it cannot be pleaded in abatement

y Return is official. And tis a principle ofy C Law
yt no official act can be falsified, ni by a
process instituted for yt purpose, and expressly
alleging it to be false.

The Shff is no party in y action between A and
B. and consequently can't appear to defend him-
self in yt action. The Party however. may maintain
an action for a false Return vs the Shff. For 813.
1 Bb R 393.

In Count. if y Return is defective in point of
fact. y Def is allowed to plead it in Abatement—
Secus at C Law.

Venue. Want of venue is a good cause of ante b.
Abatement. In y Eng. original Writ, there must
be a venue laid— By venue, is meant vicinity
or vills, ni wh an act is done. 7. TR 243. 5 Bac 322.
2 Ch. Pl. 329 n. 6. For 649. 1 Saund 82. n. 3. 2 Do.
5. n. 3. 2 Phill 136. Post 115. ante 26.

But in transitory actions, it ant necessary, yt
y venue be laid & if it is incorrectly laid, it is no
cause of abatement (in Local I presume) y venue
must be laid in y County, in wh y action is b'd.

By y C Law, he was oblig'd to lay y venue,
truly, but y Law of venue is now essentially
alter'd. Where y action is transitory, y cause of action
may arise in one county, and the venue be
laid in another, y Et may in its discretion
change the venue. An Issue in fact ca not
be formerly true, ni by a Jury from y very
vicinage. Com D. action. No. 13. Salk. 669.
70. Corp 570. 3 East 329. 1 B et P. 20. 245. Lawey
74. Bac 55.

In Local actions, a false venue is good ground of Abatement. Com D. Abr. h. 17. 1 Bac 34. 5. 7 Co 2. 3.

Thus in Real actions, as "Quare Clausum fregit" y venue must be laid in y county, where y cause of action arose. It ed no more be laid out of y County, ym in a foreign country. Before Single magistrate, Justices of y Peace, &c y venue must be laid in y town, where y cause of action arose. 1 Bac 345. * or quare domum fregit"

note as to contracts of Servin. see 1 Bac. 35. Cro J. 375. ante 26. not Local I conclude.

In transitory actions, y Law of Count is different, y action must be laid in y town, in wh y Plff or Def resides

as Case 1st Cause of Abatement is, yt y ^{form} cause of action has in hin been misinferred. This may be taken advantage of account of. not only under the General Issue. Com D. Matemt G. 5. ~~Id~~ 579. Lawes 106. Hob 199 2 Lev 197.

Com D. G. 5.

10th Cause of abatement is, yt y cause of action was not complete, when y Suit commenced, and y constitutes a good defence to y action. as If an action was brot by admⁿ in their official capacity, before letters were issued, empowering ym to act as Admⁿ, y cause of action wd be incomplete and therefore pleadable in Abatement.

Parke 114. Com D. Abr. G. 6. Cro E. 325. Cro J. 78-70. 59.

or to y action, 2 Lev. 197. Lutw 814. 16. 1 Show. 149. Gelv. 70. Hob. 199.

Mode of pleading in Abatement

Pleas in abatement regularly begin and conclude to y writ, or as y case may be, to y declaration.

3 Bl 303. 5 Mod 132. 44 Bac Abr. Pl. f. 12. Sid 584. Doct
Plac. intr. 1 Feb. 197. Lawes 108. 9. 160.

By concluding to y writ, is meant, praying ~~the~~
Judgmt of y writ, yt it may be quashed: y same
of y Declⁿ.

There is an Exception, wh is, where y Plea goes
to y person. - In y case of a Plea to y action, it
begins and concludes by praying Judgmt, yt y Pltff
may be barred of his action. -

When y Plea goes to y person of y Pltff, it concludes
by praying Judgmt, an y def ought to answer.
Obid Lawes. 109. There is y^e Expressed well?

It is said, yt y character of a Plea is decided by its
conclusion, and yt alone, according to this Rule, if
Plea, or y subject matter concludes to y
writ, it is a Plea to y writ. This however ant
a universal Criterion. 11 Mod 112. 4 Bac 50. 12. Sid 584.
La Ray 694. Lawes 112. 4 Bac 50. (* not y correct
Rule.

The true Rule laid down by La Polo, yt y character
of a Plea, is to be determined by its beginning
and conclusion, is supported by Mod. authority.
Bac Pl. f. 12. 1 Ch. 448. 2 Saund 209. 2^d Abr. Sid 584. 1019.
95. Lawes 107. La Ray 593. 1019.

The beginning and conclusion ought to be alike,
but by ignorance, and inadvertence, they sometimes
vary. It is certain, however, yt where they are
alike, they determine y character, wth
reference to the Subjectmatter Obid. 2 Mod 503.
2 Saund 209. 6.

There is an Exception, where a plea goes
to a person of a def, as Teme Covert. ~~He~~ then
prays Judgment, an Pctf ought to be answered

The distinctions are very artificial, and subtle. If y matter pleaded is good in Bar only, and if y Plea either begins in Bar, & concludes in abatement, or *vice versa*, it is a Plea in bar. If both y beginning and conclusion are in Bar, y plea is in Bar of course, and where they differ, y submatter decides y character of y Plea. y beginning and conclusion neutralize each other. There is unusual confusion on y subject. But y last Rule seems y most correct and definitive method of deciding y Question.

Thus according to y Rule, if y beginning and conclusion differ & if y submatter is good in bar only, y plea is in Bar. If good in abatement only, y plea is in abatement. Even y Rule isn't universal. *Bar Ab. Pl. & f. La Ray 593. 1018. 2 Saund 209. C. d. 2 Ch. 445. 6.*

But it seems to be established, y if y matter is good in abatement only, and begins in Bar, and concludes in abatement, or "e converso" y plea is a plea in bar. when it determines vs the Def. But if it goes vs the Pltff, it is a plea in abatement only.

This distinction is made to discountenance dilatory Pleas. It does not agree with y general Rule just stated. *1 East 636. 1 Lev 311. 12. La Ray 1018. 1 Ch Pl. 445.*

There is a class of Pleadings, wh come within none of these Rule. and distinctions.

If y subject matter pleaded, is good either in Bar, or abatement, then y Rule is, y if y Plea begins in abatement, and end in Bar, or "vice versa" y Pltff may either answer it

If def were to plead at one and y same time, 2 pleas of different classes, y latter wd waive y former. In Count and Mass, y practice has been for y def. to assign any number of causes of abatement in y same Plea. This is in direct opposition to y C Law Rule. Term Pl. 60.

ante 36. When a cause of abatement is pleaded and Judgment rendered upon it - Error is pleadable of y^t Interlocutory Judgment, as well as of a Final Judgment. Suppose a good Plea in abatement is demurred to and overruled, a writ of Error may be founded on y^t Interlocutory Judgment - but a writ cannot be obtained, till Final Judgment is rendered. 6 T.R. 766. Carth 124. Cro E 552. Doctr. Plac. 5.

Where matter of abatement is no ground of Error is pleaded in abatement - If not pleaded, it is waived Doctr. Plac. 5. 6 T.R. 766. 3 Bac 151. Ibid

In a "Sci Fa" on Judgment, y def is not allowed to plead in abatement, any thing wh he might have pleaded, to in y original action 1. Saund 219. c. Tab 2. 1. Salk 2. 310. C. Litt 303. 1 Mil, 258. 3 T.R. 687. 9 Bac Ab Pl. 7 13. Str 732.

Again a writ may abate in part, and yet stand good for y Residue, and y Ct may abate as to part of y writ, when y Pleas go to y whole. Suppose debt to be brot on 2 bonds of A. but one of ym is Joint with another Here y plea of Non Ponder will abate as to one and not as to y other Lawes, 106. 7. 2 Bet P. 420. or 426.

Two causes of abatement may be pleaded to different parts of a writ. As an action is brought on 2 bonds, but in one, y day of payment had not arrived, and in y other, another Person is Pledged. 2 B. & 22.

Sam. 107. 8.

Again y Def may in some cases plead in Abatement, as to part, and in Bar as to y Residue. This Rule 58 holds however, only where there are 2 or more causes of action. But where there is but one cause of action, I'm not aware, yt there can be 2 different Pleas. Ibid.

As a Plea in abatement does not go to y merits of y case, it follows, yt Judgment in favour of y Def, don't bar a future action. In general, a Judgment in Abatement, is what is called an Interlocutory Judgment.

There are some cases, where a final Judgment may be granted on a Plea in Abatement. In these cases, tis of course, a Bar to any future action. 4 Co 43. a. 6. Do. 6. 7. 8. 46 8 Do 37. b. 98. a. Com. D. & L. 4. Bac Ab. Pl. C. 110 170

Judgment
on a Plea
in abatement

Judgment

The distinctions in these subjects are these,
1st If Judgment on a plea in Abatement, go in favour of y Def. it is yt y writ may be quashed. If y writ be not amendable, y parts are Bar to y action 1 Bent 22. 2 Show 44. Yelv 112. 4 Bac 57.

2nd If Judgment be rendered for Plff on Demurrer, it is an Interlocutory Judgment, called "Respondent ouster" 18 yt y Def. answer over. 3 Bl 303. 96. j / East 542. Yelv 112. 2d Ray 594. Ray. 119. 2 Mil. 367. 5

3^d But when an issue in fact is joined on a plea, in Abatement, and found vs the def, y Judgment goes in Chief, or "quod recuperet" according to the C Law in Eng. This is a Rule adopted to discourage dilatory Pleas, wh are false. This Rule don't hold in Indictments for Criminal Cases. It is dispense with in "favorem of vita" 6 Mod 236. 1 East 544 2 Hawk 334. 1 Bac 15. m. Lawer. 73. In Court, y Rule is adopted in civil cases, with y Exception if found by the Jury, it is final, for there shall be but one trial by Jury. Yelv 112. 1 East 544.

Doctr Pl. 15. 2 Nils 368. Ibid.

But if y question is to be tried by y Ct. it has been usual to award a "Respondat Ouster" It is so decided in 2 Court R. 377. but not so reported. 2 Proft 204.

59.

4th If def pleads in Bar, what is mere matter of Abatement, it is bad, and Judgment will go vs him in Chief. It is a Rule, y^t a def cannot demurr. in Abatement. The reason is, y^t mere matter of Abatement is no cause of demurrer. If then Def demurs in abatement, Judgment will go vs him. Talk 20 2 Hawk 334 1 Lilly Cr. 8. La Ray 1020. 1 East 634. 1 Ch. 445. Nils 400. 70. 220. 5 Mod 195. 8. 7. do 97. If he pleads, in y manner, he precludes himself from pleading again.

After Judgment of "Respondat Ouster" he cannot plead again, otherwise he might plead "ad infinitum" This Rule is to be understood of Dilatory Pleas of y same nature, or kind 7. Mod. 97. 2 Fama 41. 1 Ch. 457. Lawer. 172. Hot. 126. Gill His Com pleas. 208. Contra Plowden 73, 273 a c 51

After a plea to y Jurisdiction, he may still plead to y disability: for these are distinct Species of dilatory Pleas. - The last rule mentioned, however, does not obtain, when after Judgmt, yt y writ abate, y Plt has his writ ~~amended~~.

There has been no Judgmt of "Respondet Ouster"
He who amends his writ, makes it from yt moment, a new one. 2 Tama 40. 1. Doctr Plae intro 5.
Kirby 5. 6. Hob 26. Bac 14.

When after Judgmt, yt y writ abate, as to y new amended writ, y def is still at liberty to plead, in Abatement.

After a general Imparance, y def can't plead in abatement, ni y cause of abatement arises after Imparance. Bac Abr. Pl. C. 2. T. a 422. 3.
3 BB 316. Kirby 586. 4 Bac 29. 143.

But after particular imparance, as he may plead in Abatement. # Continuance. Bac 9.

Restraint of Pleas in Abatement

There is a standing general Rule, yt there is a certain period, within wh. Def must plead, if he pleads at all. This period in Eng. is four days after y Return of y writ. 3 BB 316. Com D. Abr. 5. 18.

Bac Abr. C. 2. pl. T. a. 422. 3.

The period required in Connt, is y afternoon of y 2^d day, after y opening of y Sup Ct. In y county Ct. at or before y impaneling the Jury.
1 Root 564

When y period for pleading in Abatement, has expired, and no such plea is made, y right is waived. - One Exception in Connt, in case of

foreign attachment: where y Law continues y attachment to y 2^d Term. - The def ant precluded from pleading y abatement at y second Term.

00. When a new cause of abatement arises after y time, y def is not precluded from pleading in Abatement. Suppose a feme sole is married after y time for pleading in abatement has expired, y def may plead y marriage in Abatement for a feme sole has no right to continue an action after she becomes feme covert.

See Pla 297. 2 Traa 7. 77. Lawes. 173. 175.

This Lim^t however don't operate as to those pleas. wh are good both as to y action, and in Abatement, but he must after y Expiration of y period. plead to y action Doctr Plac. 227.

After y writ is abated, y Pltff, may under y Jo of amendment, amend y writ, on paying y costs, in when y writ cannot be amended: as in defects of Service &c. See Bac Ab. amendmt and see practice, & Com J.

61.

Dilatory Pleas concluded - Pleas to y action -

Gen
Issue.

A plea to y action, may be either a general Issue. wh is a general Plea in Bar, or a Special Issue alleging new matter, wh is a Special Plea in Bar.

A general Issue is said to be a single certain and material point issuing out of y allegations of y parties, and consisting regularly of an affirmation on one side, and a direct negative on y other -
Co Litt 126. a. Com Pl. R. Bac Ab. Pl. 91.
4 Bac 54.

There is a fault in y^s definition, y word
 "material" ought not to be used; for there may
 be Issues arising from immaterial matter
 and to comprehend these, y word material shd
 be omitted - It is however a correct definition
 of a good Plea.

According to y^s definition, there must be in every
 case, in a writ of right, a direct affirmative
 on one side, and a direct negative on y other.

Co Litt 126. a. 1 Vent 313. 2 Bl R. 62. 1312. 8 TR 278.

Post 86. If then a pleading acknowledges a Co-
 Defendant, was dead at y time of y commencement
 of the Suit. & y Plf was to plead, he was alive,
 it wd be insufficient. It has been already said,
 yt inferential or argumentative pleading is bad.
 Now the negative yt B. y Co def. was alive,
 is here an Inference, and not a direct assertion.
 The Plf shd say that he is not dead, or yt
 he is alive, and absque hoc he is dead.

The Rule requiring a direct affirmative and a
 direct negative, to constitute an Issue, has in
 modern times, been somewhat relaxed, Thus
 if Def alleges, yt he was born in France,
 it is determined sufficient, yt y Plf reply, he
 was born in England. Miles 6. Str 1177.

The rule is laid down thus

That if y Second affirmative shd involve
 y negative in y first, it is sufficient. This is
 relaxing the Rule too much.

In a writ of right however, 2 affirmatives were, & y
 always allowed, & and it is for yt reason, never called or
 called "an Issue" but a Misc. Tho in common misc
 parlance, it is called a general Issue, of a in a
 Bill of right - With y^s Exception: y General writ
 - 11. 4 e. o. p. 1. 8 2. 1. by 2. 1. by 3 Bl C. 305

Rule 1. Issue. shd be, and generally is, strictly adhered to, and tho some relaxation has been admitted, it is safest to close y writ in y most direct manner. nor is there any sufficient reason to relax. The direct Negative is y most simple of all modes of Expression. Lawes 232.3.
2 Str 477. 8. 4. 3 Bb 305. Lawes. 111. 2 Chitty

Issues are either General or Special.

Some have made 3 kinds viz General. Special and Common. The only case however, in wh they say the Issue is common, is yt of Covenant Broken. according to ym, y Issue 'Am est factum' denies y deed, but not y breach -

what

How certainly, denies y existence of a Covenant, certainly denies y breach of it. The same thing may be said of Penal Bonds. I cannot see y necessity of these distinctions. Bac Ab. P. 91. Lawes 110. 13 Lyd 593. 8 TR 282 4 Bac 54

A general Issue is a denial of all y material allegations in y decl^r wh a denial of all y facts wh y Plt^f is obliged to prove. # 373 lacd 58. 473 ac 54

A Special Issue is confined on some particular part of y decl^r, wh is material - instead of denying y whole. Co Litt 126. a. Lawes 112. 13. 145. # 3 Bb 305. 1 Faund 14. n. 3. 67. et. 131. n. 205. n. 2. 219. a 295. b. 301. 333. 347.

For when y plt^f cause of action depends upon various distinct facts, y Def may often select any one of those facts. & traverse yt. The term "Special Issue" is predicable of y decl^r

only. When taken on y subsequent proceedings, it is called simply a Traverse.

Suppose a ones B on a right of action, wh depends upon some preceding acts being performed, The def may instead of pleading "y General Issue" "non est factum" especially plead y nonperformance of y condition -

But if both general and Special Issues are to be taken on the decl^t, what name shall be given to those taken on y subsequent proceedings? They are called simply Issues, neither General or Special.

The following are some of y distinctions in y Pleas &

To actions founded on any "Malfeasance or Tort" y proper general Issue is generally "Not Guilty" -

To debt on Simple contract, "nil debet" -

To debt on Specialty "non est factum" -

"Nil debet" ant good on Specialty, for it confesses and don't avoid y deed.

To debt on Indgmt "nil Sciil Record"

To apsumsit, "non apsumsit" -

To Replevin "non cepit"

If def is charged as bailif or Receiver, never Bailif in account "Never Receiver" If both never Bailif nor Receiver"

To Warrantly sounding in Tort "not guilty" 2 East 446.

To debt brot on Penal St, y general Issue is "nil debet" tho as y claim is founded on an alledged crime, "not guilty" seems also a good Plea Both are good. 1 Freem. 402. Co 257.

4 Bac 54. 884. 1 Lev 142. Moy. 56. 3 Bl 300.

Cr 57. 3 Mod 324. Cr 257. 1 Tr 462.

To affirm it "not guilty" was s^lini y Plea, and held to be a good general Issue. It seems to be established now. y^t it aint good, and y^o "non affirmat" is y proper Plea. Str 1022. Esp D. 167. Corp 588.

To defend in "no wrong" or "non Defensum" Plea "not guilty"

In debt for Rent, it being a simple contract, "nil debet" is y usual general Issue.

Yet "nothing in Arrear" is a good Plea. Brown 13.

63. But to an action for Covenant Broken, for Rent, y^o is not a good Plea, and y reason is, y^t it confesses y Covenant, and y damages, and alleges nothing in avoidance of either, and of course tis a Bad Plea. Corp 588. Post 78.

2 John
183. 82.
1 Ch Pl
478.

In debt on Bond, y general Issue is "non est factum". If def plead "nil debet", and y Plt instead of demurring, joins y Issue. y^o important consequence follows. y^t y def is let into every mode of defence, w^h is admissibile in debt on Simple Contract 1 Vent 321. 5 Esp 38.

The plt by accepting the Issue, places his cause upon y actual indebtedness. If "non est factum" was pleaded, y simple question wd be, an y deed was made or not. Com. D. E. 42

But if Def is allowed to plead "nil debet" y question is not upon the Solemnity of y Instrument, but rests on y simple existence of y debt. 1 Vent 321. 5 Esp 382. 2 John. 183. 8 Do 82. 1 Ch. Pl. 478.

The general Issue always refers to y Count or decl^r, and never to y Mit. A plea to

y action is always to y dectⁿ Co Litt 126. u
Bac Abr. Pl. G. i. + Bac 54. #

If in an action of account, y def is charged,
in y writ as receiver generally, and in y dectⁿ
as a Receiver by y hands of D.L. and he pleads
"never Receiver" he pleads to y fact of receiving
by the hands of D.L.

General Issue, like all other Issues in fact,
is general concludes to y country and is
ordinarily triable by Jury only. Ibid 3 Bl 313.
15. # Co Litt 126. a.

The proposition is not however universally true,
There is a Trial by Record, wh does not conclude
to y country, but to y Court.

There is also a trial by Inspection also by
Certificate - Wager of Law and wager of Battel -
3 Bl 330.

The wager of Battel was supposed long since,
to have been extinct, but some modern decisions
seem to have revived it. These above mentioned,
are not triable by Jury. Co Litt 126. a.
3 Bl 313. 15. 30.

Indeed generally speaking the Judges try all Issues.
They try however this y medium of others.

The Jury answer y purpose of Record Certificate to
determine y truth of facts. It is true to substitute a
Jury, for mere documents, for does not seem very
consonant with our Idea of its constitutional dignity
Such in these cases seems to be its office -

The general Issue "of Nil Tall Record" concludes
with a verification, and not to y country -
for a Jury cannot try a Record - To y Plea,

y party who affirms y Record, must aver its Existence, and pray the Inspection of it by the Ct.

2 TR 483. 2 Wils 113. 14. 1732. 2411. 2 cases 146. 5. 220

But if y Record of a foreign Municipal Ct is denied, it must conclude to y country, for y Record of foreign Municipal Cts are not Records in y country. Lawes 148. 226. 1 B et P. 411. 5 East 473.

It is a fact to be proved by Evi, like any other fact, but it does not like a Record prove its itself. The mode of pleading is y same, if y Record is avowed to be lost. provable by Extrinsic Evi. The Plea. must conclude, I think, to y country—

There is a St in y State of Connt. enabling y Parties, to conclude by referring y Issue to y Ct, by mutual agreement, in civil cases only. St Connt. actions Civil.

64. In y same State Issues joined before single magistrates, or ministers of Law, must conclude to y Court.

The Records of a Foreign Ct of admiralty, are properly speaking, the Records of our Ct, for they are founded not on the particular Laws of our nation, but y universal Laws of all.

on Def's part
If denial comes on y part of y Def, he says, "This may be enquired of by the Ct." Of however y Issue complained of, is negative, he puts himself on y country. 10 Mod 158. 66. Co Litt 126 a. 3 BL 313.

Where one party thus concludes to y country, y Issue is closed. The form made use of, and y said a. B doth the like" y is called a Similitudo.

473 a c 54. Co Litt 126. a. Lawes 114. 3 BL 315. 11

The omission of y Similitudo, has been a ground of arrest of Judgment. St 641. Comp 407. 3 Burr 1793.

2. 1. Anna 319. a n. 6.

It is in Eng. to y^e day matter of substance. It is allowed to correct y^e misfurn on very slight ground.

Comb 457. 2 Day 392. Co Litt 206. 1 Saund 338.

In Court a want of Similitur is aided by verdict 2 Day Port 88.

An Issue always closes the proceedings, and y^e Issue derives its signification from y^e circumstances.

In conclusion of the Issue are used y^e words "in manner and form" 573. a. 214. 215. 216. 217. 218. 219. These formal words go sometimes to y^e substance of the Issue, and at other. They are mere forms.

Postea in Eng. does not prove, y^t y^e parties joined in Issue, and put themselves upon y^e country.

In y^e state, it does. The English resort to every expedient to elude y^e Rule.

Where Issue is tendered by one Party, y^e latter must join y^e Issue. If it is badly tendered, y^e opposite may demur to it. Bac Abr. pl. 9. 1. 3 Bb 314. Comb 86. 1 Saund 338. Co Litt 120. a.

Cur. 86.

With regard to y^e subject of y^e words, "in manner and form" y^e following distinctions ~~following~~ distinctions obtain.

I. They don't put in Issue y^e mere circumstances, attending y^e principal fact in question, ni these circumstances are material. The circumstances, such as time, place, manner. &c. ~~are~~ are not generally material. ni they create a variance. Str 317. 2 Saund 319. n. 6. Lawes 49. 120.

II On y^e other hand when these circumstances are material, y^e words "in manner and form"

traverses ym in issue: tho it wd seem from y simplicity of y Rules, easy to distinguish what are traversable, and what not. Some Examples, will nevertheless be necessary.

Suppose a case of assault and Battery—where y def is charged with an assault with a sword—Now does y Issue "in manner & form" traverse y fact of an assault, with a sword? No. it wd hold good of a cane, or a club—because the Instrument used, ant material—

Now where y words "in manner and form" do not traverse a material allegation, they are but form. Where y circumstances form a part of y description, it is material, and forms part of y traversable allegations. If a suer B on a bond dated 1st of July and delivers on y 12th of July, y time is material, and forms part of y description, and is traversed by y words, "manner and form" The Plt^f cannot here avail himself of a Bond dated on y 2^d of July.

Suppose again, a charged B with a Battery, committed in y county and Parish of C. y place is here mere matter of venue and not of Local description—The deed may therefore be proved in another Parish or county.

But when y place is part of y Local description, it is otherwise. If a alleges, yt B committed a battery in y room of D. it is part of y Local description, and is traversable by y words, "in manner and form" The form then puts in Issue those facts, wh are material, and dont traverse those wh are not material—Litt. 483. Co Litt 281. b. Com. D. 1. 2 Past 497. 11. Do 226. 2 Mc hally,

It has been said, y^t every Issue, to be a good one, must be material. What then is an immaterial Issue. Is it ^{leaving} one, who ~~has~~ a material allegation, on y^e other side, is taken in a point wh^{ch} is immaterial 2 Saund 319. a. Carth 371. 1 Lev 32. Cro S. 434. 585. Bos 134. 84. 92. as of def. 313 luc 195 traverse matter of mere inducement, as it is an immaterial Issue, a fiction, & impertinent matter.

An immaterial Issue is a Radical fault, and not cured by verdict - Suppose ~~an~~ ⁱⁿ affirmatio vs an Est. y^e def alleges, y^t he didnt promise, here if issue is taken, it is entirely immaterial - 3 Bl 339. 2 Vent 196. 2 Mod 137. 1 Mil 338. Bac Abr. P. G. 1. Com Re. 148.

Where an immaterial Issue is found in favour of himi. who tendered it, a Repleader is awarded. If vs himi. it is final.

Where there is no material allegation on one side, there can be no ⁱⁿ material Issue, for since y^e pleading is so defective, there is no possibility of taking a material Issue, and under y^e circumstance, of the case, it is the best wh^{ch} can be given.

Thus if all y^e debt is evil, y^e def may traverse any part of it - If in such case. Judgment is awarded, vs the Plt^f, no Repleader will be allowed - It is a good General Rule. y^t ~~the~~ ^{on} issue cant be joined on a negative or affirmative Pregnant. A negative pregnant is one, wh^{ch} implies an affirmative and vice versa.

An Issue taken on these at C Law ant vice by verdict Co Lito 126. 302. 3 Cro S. 87. 312. Lawes 114. 2 Saund 319. Gilb & C Pl. 147. 5 Bac 201. Bac 94. 4 do 98

By So it is cured by perdicts It 32. Hen. 8th
 There is a distinction to be observed between Issues
 taken on a negative Pregnant, and an ~~un~~
 immaterial Issue.

But an immaterial issue contains nothing
 material, but an Issue taken on a Negative
 pregnant, is taken on both, material, and
 immaterial matter. Carth 371. 12 Vin 32

So an action on contract, y def pleads usury,
 with a reservation of 10. per Ct, and Plf
 traverses, yt 10. per Ct was not reserved,
 This however implies, yt there might have
 been a ^{10th} per. cent. The plea however is good.

When y affirmative contained in a negative
 pregnant, don't aid what is alleged on y other
 side, y Plea is good. Lawes 114. has exactly reversed
 y meaning of the Rule.

A sues B on an action of Battery, B pleads
 he had a right to arrest A. and in virtue
 of his legal right, he moliter percutit manus
 on him." Now y implies he might have laid
 violent hands on him or not. Cro E 227
 2 Saund 319. b. There is a great inconsistency,
 contradiction and confusion between a Negative
 pregnant & an Immaterial Issue. 4 Bac 98

1 Do 94. 2 Saund 319. n. o.

An Informal Issue is one taken on an ~~un~~ material
 fact, but wrongly taken in point of form only.

is clearly aided by perdict 2 Mod 137. 12 Do. 19.
 1 Brā 3 36 329. 1 Bac 103. 1 Lev 32. 32.
 28 Ann 319. n. b. Carth 371. 4 Bac 56.

Traversing a negative allegation in the Technical form. absque hoc is informal.

Is not an issue wrongfully taken in point of form, on an immaterial allegation, informal? No - for y greater fault of its being ^{an} immaterial fault characterizes it - 2 BC 395. East 371.
1 Lev. 32. 2 Saund 319. n. b. 6.

The general Issue covers the whole declar. and by y^e is meant, Def may traverse any thing contained in y declar. This Plea in its nature, does not involve any other y^e matter of fact.
1 Ch. 478. Eo 124.

As a matter of Record, y general Issue is considered as denying every material allegation. Tho such is y effect on the Record, yet def may not intend in reality to contest a single point - Suppose an action brot on a Bond made by a Feme Covert, she may admit the making, Sealing, delivering &c. and yet plead her incapacity to make one - Pow C 97. Eall 7. 2 Bl R 1082. 2 W. Will 145.
1 Chitt. R 149. 1 Mod 311.

In point of Law, she is morally incapable of making one. The deed is a carte Blanche, 3 Ke 228 and therefore she may plead "non est factum"
1 Talk 7. 2 BC R. 1082. 1 Ch. 478. 2 P. Wm 140.

Eo 124. 1 Pow C. 97. 1 Mod 311. see Ch. 478.
for y difference of y incapacity of a Feme Covert, to make a deed, and yt of a minor & Lunatic - The latter is voidable - The deed of a Feme Covert "ipso facto" void.

On y other hand when y deed is absolutely void, in its nature, and not from y incapacity of y person making, y general Issue of "non est factum"

is not proper.

I suppose in an action brt on an honourable bond y general Issue is improper, for y obligor being competent to form a deed in point of fact, y Instrument is considered his in point of fact. Tho' not obligatory in point of Law. Ep. 223. 2 Bb. 292. 5

Again when y incapacity of a party, who has executed a deed, is not absolute, it is not proper to plead y General Issue. Thus in y case of an Infant, who is considered as possessing no Real^m Competency, but not discretion -

The defence of Infancy is therefore inconsistent with y Plea. for y plea asserts, yt he did not make it. 1 Ch. 478. 9.

It is a general Rule of y C Law. yt when a Speciality is made void by St. y fact wh make it void, must be Specially pleaded. La Co assigns for a reason, the high solemnity of the Instrument. Infra.

The true reason is, yt these facts are utterly repugnant to the General Issue. "non est factum"
5 Co 119. n. a Ep D. 223. La Ray 313. Talk 575.
St 498. 3 Burr. 1800. TCo 72. 160. Gilb Cr 162. 3.
273. n. 70

Coverture is y only case, where y Party may plead "non est factum" and yet may make a Special Plea. and give in Cr the nullity and illegality of the Instrument

Tho' an illegal Instrument is certainly void, and cannot impose an obligation on a person, yet when there is no Incapacity of y ^{party} person drawing it, y defence of "non est factum" ant enough. Ibid -

There are several defenses, not may be given under
y general Issue, 5 Co 119. 11. Ford 27. a. Co. D. 223. 4.

Thus an Erasure may be given as a defence,
for y def may plead, yt he didnt make y deed,
as it now is, and consequently yt it is not
legitimately y same.

The loss of the Seal may ~~it~~ also be pleaded,
under y General Issue, for y Instrument is not legal
without it.

We are not to understand however, yt y Plff wd
lose his cause in such a case - he wd have
his remedy in y Cts of Chy.

Now when the seal of a deed was destroyed by
mistake, an action of debt will not lie, nor any
action at Law - The proper course to be pursued,
is by filing a Bill in Chy. and y deed thus
changed becomes an Instrument in writing, and
is of equal force as any unsealed Instrument.

The want of "delivery" wd also be a good defence -
how advantage may be taken of all these
defects under the General Issue.

It is a General Rule also, yt matters of fact
only are put in Issue. under the general Issue,
there is an Exception, however, in the case of a
"Feme Covert," before mentioned - This is "Tunc
generis" 1 Ch. Pl 478. Co. D. 224.

Matters of Law under y It may be tried under
y General Issue. This is not the case by the C Law.
1 Ch. Pl. 475.

What defences are admissible under y General issue? If y defence is admissible under y General issue, it must be consistent with it.

68. As suppose an action brought on a deed, any alteration of y^e deed may be hot under the general Issue. Infancy. Nonry. Durety. &c. must be specially pleaded.

The reason is, y^e these defences, are inconsistent with y General Issue, and therefore inadmissible. In y action of Indeb. ass^t. there is a very great licence allowed in the defences. For in y^e action, y Rule is, y^e any thing, wh shows, y^t y Plt^f had no right to recover, at y time of plea pleaded, may be given in Cui - under general Issue.

In y^e action, y promise is always fictitious, a mere legal consequence. The material fact in question is the debt, and whatever disproves y debt or duty, disproves y promise.

On this account, I do not consider, y^e y^e is an Exception to the General Rule, for y Plea of Non ass^t don't mean, y^t Def didn't make a promise, but there is no Indebtedness.

Hence under the plea of "Non ass^t" y def may give in Cui Nonry. Durety. Release. Infancy. Payment &c. A specialty given for y same debt. award of arb^r. Accord and satisfaction or any illegality in the Instrument. Now no one of these can be given in Cui under y plea of "Non est factum" 1 Str 498. 4 Bac 601. 2 Role 682. 3. 3 Burr. 1353. 2 Do 1010. 4 Ray. 787. 2 H Bl. 143. Doug. 108. 1 Ch. Pl. 170. 2.

2 H. 731 ac 143

To accord and satisfaction according to y weight
of opinions. Ch. Pl. 472. La Ray 566. 12 Mod. 376.
5 East 280. 4 Esp. 181. Com D. accord of a bond given.
aft 70. Different opinions on y subject -

Does the same Rule hold as to Special aft?
in principle? I think, y none of these defences
will be admitted in Eri, for where there is ^{an} express
promise, there is an incongruity with the Plea -

Chitt B 197. 8. 1. Mod 210. 2 Ray, 566.

The authorities, however, hold. yt y same Rule
applies to Special as to General aft. It
originated in mistake, and has been extended
by precedent. Ch Bils 197. Esp D. 147. 8. 4 Bac 601.
134. 5. 5 Mod 18. La Ray 550. Ch Pl 472. 3.
12 Mod 377. 1 Lev 142. Falk 140. Bul N.P. 57. 2.
Esp D. 148. See particularly 1 Mod. 110. or 210.
True distinction there laid down -

But in practice, y rule applies to both Special
and General aft. La Mansfield in one instance,
seems to lay down the same Rule, in relation
to actions in the Case generally. 3 Bun 1352.
4 Bac 61. But this cannot have been his
meaning -

I observe here on y other hand, yt the Pt of Lim^t 69.
Tender. Bankruptcy. and Setoff must in
all cases upon C Law principles be Specially
pleaded, and cannot be given in Eri under
y Issue. "An aft" Ch B. 198. 1 Saund 283. n. 2
2. Esp D 147. 3 Bac 578. La Ray 153. 1 Lyd 375

The true reason is. They are defences, w^h being matter
of Law, destroy y action or remedy, but don't destroy
y Indebtedness. In all these cases, y plea admits
y debt but denies y right of Recovery -

The debt is due "in foro conscientie", but y remedy is taken away by the St of Limit. The Rules hold, as well of Indebitatus affirmat, as Special aff^e on C Law principle. 1 Lanna 283. n. 2.

But y mode of admitting Special matters of defence, under the General Issue, p. 68. is not allowed at C Law. in cases of "Tort" any more ym in actions of Specialty - for all these defences are inconsistent with the General Issue. "Not Guilty"

Thus take a case of Release, The def pleads a Release, & a Justification of a fact, wh in general Issue, he denies - So of Licence. So of any Justification in an action sounding in "Tort" Post 72. 82.

See Trespass. aff^e and Battery. 4 Bac 60. 2 Roll 682. 5 Mod 252. Hob. 174. 5. Corp 478. Esp^e 317. Co Litt 282. b. Bui & A P 17.

In debt on Simple contract, y St of Limit may be given in Ple under y General Issue.

I think so of all those, wh I've mentioned, under the plea of "Non aff^e" In debt, because says La Holt, y plea "Nil debet" is in y present Sense, and as it denies present Indebtedness, it is consistent with the General Issue.

So of a Release. La Ray 103. 580. Talk 278. Esp 202. 5 Mod 18. 1 Lanna 283. n. 2. 2 Lev 218. 2 H Bb. 243. 108. Corp 588.

The St of frauds and perjuries may be Specialy pleaded under "Nil debet" under the General Issue -

Why on y principle is not the St of Limit, under y General Issue, in "indebitatus aff^e" "non aff^e"? Admissibile
Tho its language in past Sense, is in legal operation

in y present. It refers to y time of Pleading -
Hence every defence admissible under "Hil Debet"
wd seem to be so under "non apt", at least
in "in debitor apt"

In y action of apt, y st of frauds may be taken
advantage of under the General Issue.

There is no necessity for it, but it may be done,
The def may plead the General Issue, and object
to Parol Testimony -

2 Lev 214. , Br Chy. 92. , Ch. Pl 470.1.

75.

It is a universal Rule, yt every defence to y action,
wh can^t be Specially pleaded, may be given in Bar
under the General Issue. But these Special defences
abovementioned, wh might be given under the
General Issue, may be pleaded Specially -

The only reason why a defence cannot be specially
pleaded is, yt it an^t to a General Issue.

Every defence must be admissible ^{under} to some Plea under
to y action, and there are but 2 such Pleas, viz
y General Issue and the Special Plea in Bar.
If then y Rule were otherwise - a person might
have a good defence, and yet not be able to
plead it. Lawes III. These distinctions are derived
from the C. Law, but don't universally hold in
practice. The Sts of other States allow other
defences to be given, for y purpose of Liberalizing
and giving advantage to those ignorant of y Law.
The consequences have been mischievous, the number
of ignorant has been truly increased -

In Conant. tis a Rule introduced by Jo and
applicable to every action, yt Def may give in
Evi under the general Issue, any matter of defence
or Justification, wh goes to y action, in some act
of y Pltf. by wh def is "saved and acquitted"

226

from y pltf's demand - Its Count 342. For in y
State, y consistency of y defence with y issue, is not
y criterion - Rule of the Sup Ct as to notice.

The act of y Pltf here meant, is some act, wh
operates as a discharge of a right nec existing -
as Release, accord, and award, and arbit^r -
former Recovery. 2 Swift 208. Not one wh goes to show
yt there never was a cause of action - Hence an
action of Pltf antecedent to y alleged cause,
of action, and wh operates as a Justification
may be given in Civ. 2 Swift 208.

So I presume of any other act of y Pltf, wh shows
yt he never had a cause of action, or demand.

As Lures. 1 Kirby 237. On account or Contract -

So nursing. Infancy. 3 Day 68.

In Count. the Pt of Limit may be given in Evidence,
i.e. def may rely upon it, as his defence, under y
General Issue. - in Book Debt. So in Tort -

71.

In case of Torts in Eng. 3 Bue 578. 4 Do 61.

Said by Swift, it cannot be given in Evidence,
in apt^d because it contradicts y plea. Not Law -

Said yt it is not y Criterion under ^{our} St.

2 Swift 215. Doug. 108. Cowp 590.

In Book debt. a Release may in Count, be
given in Civ under the General Issue. The Exception,
in y St. "Supra" notwithstanding, for the St don't
intend to prevent Def. from giving in Civ under
y General Issue. any defence. wh he might have
at C Law. proved under yt Issue. But to enable
himself under that Issue. of defences, wh were
inadmissible at C Law. and a Release is within
y Scope of the Issue. and therefore admissible
under it. on y C Law principle - 2 Day 272. La Bay 566.

Talk 278. Coups 585. See as to "Indebitatus ass't" -
 ruled Brace vs Catlin. Sup. Ct Feb. 1804. Ct of Error.
 June. 1804. Quere as to y correctness of y determination.

The Rule of y Ct requires, yt def shd give notice
 of y defence, wh he intends to offer. vide Last page.

Def may instead of pleading the general Issue,
 deny any single traversable allegation, wh goes to y
 gist of y action, and conclude to y country,

as in Covenant Broken, if Pitt aver performance -
 of a condition precedent. Def may traverse y single
 allegation and conclude to y country. Lawer. 135.
 Com D. Pl. & C. 1. 4 Bac 60. 62. 67. Pleas &c 9. 3 Co.
 Litt 282. Year 195. Doctrines plac 303. Day. 21.
 Lawer. 112.

The plea then tendered is a Special Issue. see
 ante 52.

-72-

If y plea tendering an Issue, in y manner, is made
 as answer to part only of y declaration, y Residue
 must be answered in some other way. I wd it be more
 proper to place y ^{plea} and its Exceptions under
 Special Pleas in Bar?

There are some defences, wh cannot be pleaded Specially.
 A Special Plea, (to one alleging new matter,) amounting
 to y general Issue, cannot be Specially pleaded.
 Every thing is new matter, in what denies an
 allegation on y other side. - And he, who pleads
 Specially, what amounts to a General Issue.

pleads matter of fact to the Ct, wh belongs only
 to the Jury. - and it lengthens y Record unnecessarily,
 and tends to refer questions of fact to y Court.
 - new matter, wh avails y declⁿ. is admissible.

A Special plea is said to amount to a General Issue, when a Special matter alleged in it, goes in denial of a allegation in the declⁿ. - As ^{an} alibi in Trespass and pleading property in a stranger - or in def himself in Trespass. for such pleas. And they allege substantive facts in a form of new matter, are in effect. a mere denial of a pl^t's allegation, whereas nothing ought to be Specially pleaded, by the def, in new matter, the legal sufficiency of wh. it may become necessary for a Ct to determine -

Post 74. 4 Bac 60. 2. Feib. 127. Cro E 208. 329. Eps 318
413. 1 Vent 294. Jenks. 369. Cro E. 157. 3 Lev 41. 2 D. 210. 3 Bl 309. 10 Co 98. 95.

If Def in an action of Trespass, shd, as above stated, plead yt a property was his, he pleads a new fact. wh was a fact. to be tried before a Jury

A Special Plea amounts to a General Issue, where a facts, stated in the Plea, deny a declⁿ. see Supra. Thus in a case stated - A pleads trespass on his land, but B pleads, yt a land was his. But if on a other hand, a def were to plead Justification, it wd not deny the declⁿ.

Title is pleadable Specially in Connt. in Connt. to Trespass on Land. by It. So at C Law by giving colour. 3 Bl 309.

So the General Rule. Supra, 12. yt a Special plea amounting to a General Issue, is regularly inadmissible, there are Exceptions

I A Special plea amounting to a general Issue is good, if it contains Special matter of Justifⁿ
4 Bac 61. 3 Lev 40. Cro E 268. Eps 318. 5 Bac 202.

See an Exemplification of y^o Rule. Bac Ab. Pl. 9. 3.

For where a defence is compounded of a General Issue & Special matter of Justification, it must be pleaded Specially- For matter of Law ought to be shown to the Ct., and a Justification is matter of Law. 1 Saund 289. n. 1 Co Litt 283. a. 3 Mod 137. 8. Taltk 107. 8. 4 Mod 378. 4 Bac 60. Hob 127. 295. Com D. pl. E17. Post 82.

73.

II When the Special matter pleaded involves some legal sensible, some nice points, y Ct in its discretion may allow such a Plea, in some cases. If, in the legal language of Tolt- y fact. pleaded may breed² sensible, in the legal sense. 18. the Law Gent. 2 Bac. 62. 3 Cro E. 871. 2 Mod 274. 176. or 166.

Aliter if the defence is mere fact as Abiti-

III. In trespass or assise, a Special Plea of Title, giving colour, is good- Post 74.
11 Co 90. 1. 88. 3 Bl 309. Lawes 57. 126. 7. 150.

Such Pleading, is according to some authorities, proper cause of ^{special} demurrer.

According to others it is not, but of a motion to y discretion of y Ct praying an order to the def. to abandon y^o Plea, or to abandon his defence.

The latter is y proper Rule in Court- as to y first opinion. see. 10 Co 95. a. 4 Bac 60. 134. 5 Bac 202. 2 Cro Ch. 107. 112. 1 Ch. Pl 498. Penk 306. But still, it seems, y Ct may in its discretion, allow it.

Supra. as 2. Cro. E 87.

Therefore according to the authorities, it ant regularly, a cause of demurrer, but of a motion to y Ct, y^t y general Issue or "Nil dicet" may be entered-

This seems to be y true Rule, For it is deemed Expedient, yt y Ct shd have y right of exercising a discretion in allowing, or disallowing y Plea. But no discretion cd be exercised, if y Pltfd could claim, as of right, a decision upon demurrer. 5 Bac 201.2. 1 Ch Pl 498. H St 127. Cro B. 175. 105. 2 Mod 274. 5 Mod 18. Co Litt 303.

So decided in Count. 2 Day 431. The former practice was to demurr.

But if y Ct won't allow the plea, and def refuses to plead, y general Issue, and Poini in demurrer. Indgmt will go vs him. The Pltfd. however. can never be driven to y necessity of demurring. 4 Bac 134. 10 Co 94. Denks 306.

In this case. therefore, it is ~~an~~ correct to say, yt y plea is ill on demurrer. or after y Ct has disallowed the Plea - if y Def won't allow y General Issue. Pltfd may take Indgment. as by "Hil Dicit" 3 Bac 202. 4 Ibiā 61. Cro B. 165. 319. Bac Ab. pl. n. 5. g. 3.

But there is a material difference between a Special Plea amounting to the General Issue, and a Special Plea alleging facts, wh, in Pri may support the General Issue -

For y latter does not necessarily, as a Plea, amount to y General Issue - as. Pleas of Release to apsumsit" or debt on Simble contract. (no Special plea wh allows y debt to be traversed) true am't to y General Issue.

74.

For instance in y action of "ass" a release may be given in Pri, under y General Issue - yet it may also be Specially pleaded. - Do they not amount to a General Issue? No, for they

all admit y decl^r. A Release admits, y^t a promise was given. So also pleas of Infancy, Coverture, Duress. Ch B. 197. 8. Ld Ray 88. Salk 392. 4. 5 Mod 18. 4 Bac. 62. 134. 5 Com 76. Carth 356. These defences do not amount to y general issue, tho they might be given in Cri under it. Lawes 112. Syd 591. 99. In apt^e paymt. may be Specially pleaded.

For they do not deny y fact alleged, in y decl^r. as the general issue always does, but go in Cri of ym. By what distinction, then, shall we distinguish between these 2 Classes?

No plea, in general wh admits, y^t there was once a cause of action. (as Release. Paymt. Ld Ray 217). or y^t y allegations in the decl^r are, ^{true} tho it denies, y^t there ever was, so cause of action, or (Usury. Duress) amounts to the general Issue; tho y facts, pleaded, might have been pleaded under the General Issue, and wd have supported it. Ld Ray 88. 9. 566. 787. 1 Ch. Pl. 491. 2. 496. 1 B. et P. 213. 4 Bac 62. 134. Ch Bills 197. 8. Cro E 87. Salk 394. Co Litt 202. b. 283. a Com D 4. Carth 188. Tidd, 191. 7.

For such Pleas don't deny the decl^r, ut Imp. as last given - ante 72. 66. 39. 87. 57.

In such cases, y defence is "matter of Law." i.e. new matter, legal sufficiency of wh. may come in question - As Feme Covert, may, to sett in bond, made during her coverture, plead her Coverture - Ld Ray 88. 9. Lawes 129. 1 Ch Pl. 437. 470. 12 Mod 101. 8 TR. 545. to no action.

Advantage is taken of her coverture in y^e case, not by way of privilege, as being sued alone, when she is liable to a Suit with her husband

(as is done in abatement) but as rendering y contract void. (for y form of a plea in Bar see Ch Pl. 420. 410.) The Mus admit y fact, but avoids ym. by matter of Law. So Release, &c in debt on simple contract -

and in Court, it customary, to plead Specially other defences ym acts of y Plt. Especially in action, in contracts - Tho in cases of "Tort" y general Issue is almost always pleaded. ante 70.

Pleading Specially (in y form of Special Pleas) what amounts to y General Issue, is warranted "in apine" & Trespas. by giving colour to the Plt, 18. by alleging some feigned matter in Plt, favour. in order to Indify, in answer to it - a Special Statement of Defs Title - 4 Bac 102. Lawes 52. 126. 7. 150. 10. Co 90. 188. Cro. J. 122. 3 Pl 309. 5 Bac 208. n

By giving colour to y Plt, is meant, by y ascribing to Plt ^{fictitious} a Title defective in Law, in order y^t Def may allege another Title in himself

Def must take care to make the Title defective - 10. Co. 90-1. 88. Cro. J. 122. Pl. 309. 4. Bac.

If def allege a title solely in himself, he pleads a mere matter of Fact to the Ct., by giving Title to the Plt, y question of Supremacy arises, wh is one of Law and not of Fact. The Plt cannot deny the Title given him, but he may deny the Title of y def.

Thus Title in def is a good defence under the General Issue. see Lawes 126. 7. 7. Pl 354. 3 Jo 403. 2 Ch Pl. 552. n.

But y def in Trespas may plead "Liberum

"Tenementum" 1 Saund 294. n. 6. without giving colour.
 Lawes 128. 1b Pl. 501. 10. 128. 2 Ch. Pl. 507. Com D. Pl.
 3. m. 33-40. Miller 218. note, it does not deny
 y decl^r, as the pl^t may still have some right.
 as. A possession title—

The Rule depends upon y doctrine of 'Com Bar'
 explained in Miller 218. 1 Saund 299. b. m. 6.
 2 Bb 1089. 7. J R 387. 5. Faltk 433. 6 mod 117. La
 Ray. 333.

Common Bar was in one case, held not traversable,
 Cro J. 594. This ant Law. 6 mod 119. Miller 223.
 1 Saund 99. Secus when the pleader title goes to y
 possⁿ. Lawes 128.

On replying matter of title to a plea of Title,
 Pl^t need not give colour. 1 East 212. But he may
 do it. Lawes 157. 8. 1 East 212. 15. Quere wd it
 not be ill on Special Demurrer? Lawes 158.

A plea stating Special facts, wh go to prove y
 General Issue, and concluding with y Gen Issue,
 is not a Special Plea. for it concludes with
 y general Issue. It contains, however, Special matter
 like a special plea. These facts only state y grounds
 on wh def relies in pleading the General Issue.

As to an action on Bond, y^t writing was delivered
 to D. as an Exec^r. and so not his act.
 So also, y^t the Bond has been altered by the Pl^t.
 D so not his act.

So in action on Deed, y def may plead, y^t at
 y time of making the deed, she was a feme covert,
 and so not her act. This is called a General Issue
 "ifint" with an assent. Gill L. Evi 164. b. 4 Bac. 62. 89.
 5 Com. 85. 7. Faltk 274. . Esp 222. 1 Vent. 9. 216.
 Pioro 66. is a Special "non est factum"

The plea, according to some, must conclude to y country.
 3 Feb 26. Plow 66. 1 Vent 9. 210. 4 Bac 62. 89. 5 Com.
 85.7. Falk 274. Ep 222. According to others, it may
 conclude with a verification. Gilb Eri 164-5. Moys 112.
 Moore 30. (The former, y better opinion, says I G)

It seems extraordinary, yt any diversity of opinion on y
 subject shd ever exist. But if it does, so conclude, 12
 with a verification, it wd seem not to be a plea of
 this kind, not y general Issue, with an "issint" but
 a Special Plea, amounting to a General Issue.
 It is useful in giving notice to y Plff of y true
 defence, and confining y attention of y Jury to y particular
 fact stated in it. Gilb Eri 163.4. Plff, it is said,
 may plead over, and take issue in the Special matter,
 Falk 274.5. What possible use can ^{there} be in thus doing?
 For the Special matter is an issue of course, if not
 demurred to, and y Def is bound to prove it.
 Indeed tis y only matter in issue under y plea.
 It may be demurred to, it seems, even tho it conclude
 to y country. Gilb Law. 164.5.

For y Special matter may not in Law. support
 y General Issue.

Anciently if a deed, (executed in point of form),
 was originally void in consequence of some thing extraneous,
 as Coverture, or became ^{come} so by something Ex post facto
 as erasure or interlineation Pe y Def cd not plead
 y General Issue. ni with an "issint" 6 Mod 318.
 It ant so now Gilb Eri 103. 4. for y old Rule
 see 5. Co 119.

Ed Holt says, a Special "Non est factum" is always
 impertinent, as it subjects y def to y "onus probandi".
 4 Bac 62. 6 Mod 218. Quere how Impertinent?
 It subjects y def to the "onus probandi" it is true,
 but it may be very convenient in narrowing the

y enquiry without prejudice to him, and if y def is willing to assume y burden of proof, it is a little difficult to say why it is impertinent - On y other hand, it is convenient in narrowing y enquiry and warning the Pltff. what ground of defence, y def will take -

II. Special Pleas in Bar.

A Special plea in bar is usually defined to be one, who admits y facts stated in y decl^r, and avoids ym. 4 Bac 66.2. Dyer 66. Lawes 110. 37.8. 129.

This, tho' generally true, is as a definition defective, for a Special plea in Bar, sometimes, traverse, part of y decl^r ante 72. Post 91. Soph. 4. 4 Bac 70. 90. Hob 104. Eb 418. 1 Bent 79. Cro E 30. 418. Lutw 38. Lawes 116. 21. 118. 148. as decl^r in Trespass, plea. lies in on such a day, with a traverse as to y other times -

77.

A Special Plea in Bar, I shd define to be one, who alleges Special matter in Bar of y action - and concludes with an averment. It regularly admits all traversable allegations, who it does not traverse, and it goes in avoidance of what it admits - 4 Bac. 2. 73. Faltk 91. 1 Mil 338.

Note. There is one kind of Special Plea, who is good, tho' it neither admits, avoids, or denies y Pltffs allegations, strictly speaking - but shows, y^t Pltff is precluded from averring y facts, ⁺ as true or untrue, alleged by him, and of course, he neither admits nor denies ym.: y kind of Pleas are called Pleas in Estoppel. This is an Exception to y General Rule advanced above. - Lawes 38. 130. 40. 46. 156. 161. 170. 3 Bl 308. Miller 13. 3 Case 346. 65.

In actions sounding in Tort y most usual plea in Bar. is a plea of Justification -

It is a Rule in pleading, yt every plea in Justification, must confess y facts intended to be justified. 1 Saund 28. n. 1 & 318. 3 TR 298. 1 Saund 14. n. 3. Salk. 394. East 380. It wd be preposterous, to say justify what is not admitted to exist. This however may mislead, for by saying, yt it must admit what it justifies, is meant, yt it must be so pleaded, as not to deny it - it must tacitly admit it -

So of matter pleaded in Excuse. Semble - 1 Saund 28. n. B. Thus if in Trespass for Battery, y def instead of denying, or confessing and avowing it, justifies an act, wh does not constitute Battery, y Plea is ill on Special Demurrer. 1 Saund 13. n. 3. The Fault is only formal. 3 BL 309. A Barty may expressly admit an allegation on y other side, wh operates in his favour, and thus make it a part of his case. Lawe, 143 4.

Any fact not in Express denial of the allegations on y opposite side, is new matter.

A Special Plea in Bar in every instance necessarily alleges new (or Special) matter, and it is usually in y affirmative[†], (tho not always - sometimes it is in y negative - Of an action is brot on a negative ^{covenant} contract - (see Count Broken 3 BL 309) y Special matter must be ^{in the} ~~negative~~.)[†] Hence it must regularly conclude with a verification, and "ys he is ready to verify -"

The form of verification is artificial, ys form is y only mode however, of keeping the pleadings open. For when new matter is alleged, by the def. y plff must evidently have an opportunity of pleading

is ym in either of these ways- by denying ym,
by demurring to ym, or confessing and avowing ym.
by new matter of his own.

78.

Hence till a proper issue is tendered, y pleadings
must be kept open. yt each party may have
an opportunity of answering the allegations by y other.
Lawes. 159. 1 Saund. 103. n. 2. Lawes 159. 3 Bl 309-10
Doug 58. Comp. 575. 2 Burr 772. 2 Bl 1725.
2 A R. 353. n.

Exceptions in y case of a General Plea of Banishment-
under 5. Geo. 2^d. Lawes 140. 115. 224. 227. ante 9.
80. 87. in this case he ^{may} conclude to y country-

person

Pleas merely negative need not be ~~re~~ verified-
For a pleading negatively cannot reasonably be
required to verify it. Def may pray Indgmt
wthout verification. et Negative Special Plea in
Bar however, may be concluded with a verification-
And y^s ant y custom- Lawes 140. Miles, 5.
As a person cannot in general be required or expected
to prove a negative

But pleas, wh form. (or rather tender) a complete
and proper issue, triable by Jury, must conclude
to y country- 5 Com. 86. Raym^d. 98. Carth. 58.
Lawes 140. 3 Bl. 309. otherwise y pleaded ^{ing} might
never be brot to a close. The plea in y former
case. must leave y pleadings open- in y latter
must conclude to y country-

When y Def alleges distinct matters of defence,
to different parts of y declaration, (or cause of action)
he may conclude each separate matter of defence,
with a verification or y whole with one.

1 Saund 338. n. ⁵⁰6. 339. n. 1. Salk 312. 298.
Carth 43.

Requisites (ante 77)

I have observed, & all Pleas in general admit of course what they don't deny. If all material allegations, wh they don't deny. Hence "Nil debet" is not a good Plea to debt on Bond. For y Ecctⁿ is admitted, and y cause of action not avoided. y Plea alleges nothing in avoidance of it. 4 Bac 83. Harv 33. 332. 1 Tamm 39. in 1 Lev. 170. Ld Ray 1500. 2 Jcs 788. 80. 5 Burr. 2585. It is ill in General Demurrer. 2 Nil, 16. Esp 224.

Ld Coke's General Rule is, Every def must plead such a plea as is pertinent and proper, according to y quality of y case. Estate or Interest. Co Litt 285. 303. 4 Bac 83. This is say. every plea shd be a good one.

Every Special Plea must contain issuable matter, Secus it aint triable. as If def in action on Bond. plead, yt he has always been ready to pay the debt. sued for, wihout more, it is not good. because it is not issuable, besides y fact is immaterial, it is no performance of y contract. yt he shd be ready to pay, but yt he shd pay. Lawes 137. 8. 157. 8. 2 Nil 74.

Every Special Plea. in wh fact and Law are so blended, yt they can't be separated, is ill. as yt a lawfully enjoyed y goods of Teln, in such a place. Lawes 138. Every Special ^{plea} must, as far as it is practicable, separate matters of Law from matters of fact. In a word, when matters of Law and fact arise from y same defence, y matter of fact must be so alleged, as to be distinctly traversable. Thus in y case Attne

just stated. A sues B for Trespass, and B pleads, yt A is an attainted Felon, and yt B has a Lawful right to y goods. of all attainted Felons. such a Plea is bad. for it blends matter of fact and Law. He ought to show y Special matter, on wh y right was founded. He shd have pleaded y So wh created y right.

A traverse of y allegation in y above form, and embrace all matters, both of Law and fact. wh could go to establish such a right. 4 Bac 68. n. 2 Mod 55. 9 Co 25. a. Bac Abr. Pl. # 1.

A plea in bar to y whole debt, must answer y whole gravamen. or cause of action. After it is ill for y whole. As A sues B for assault and Battery only. and mayhem. If he pleads to y whole, justifying y Assault and Battery, i.e. alleges matter wh justifies y assault and Battery only. it is ill for y whole. And y plff may demur to yd, and y Dm in assessing damages. must give ym. for Assault and Battery, as well as for Mayhem. The same Rule holds as to the subsequent proceedings.

Suppose A brings an action of Contract vs B, for 1000^l. B pleads Infancy. A replies, yt 500. of y sum was for necessities, the Indgmt must go for y whole sum. For an entire plea cannot be avoided in its effect. Post B. 4. Lawes 115. 17. 1 Samsd 28. 2 Do 50. 127. 210. b. C. 1 Do 268. n. 1. 4 Bac 86. Cro E 268. 3 Lev 375. Hob 327. 8. 1 Lev. 16. 48. Esp 318. La Ray 229. 5 Com. 645. pl. 51.

So in Trespass, if a Release be pleaded, all trespass afterwards must be traversed. Hob 104. 1 JR 636.

Thus y replication must answer all y^t material in y plea.

As to y application of y Rule to subsequent proceedings - see 1 Saund. 28. n. 2. 1 SR 40 2 Saund. 127. 1 do 337

But y^s General Rule does not prevent y def from making different pleas. to different parts of y declⁿ. (or alleged cause of action) Lawes 101.3. Post 97 an y declⁿ consists of several counts, or one only. As suppose in y case of ap^t and Battery, and mayhem y^t B pleads an official right to arrest, and as to the mayhem pleads self defence, y plea is proper.

So again if trespass for 10. horses. not guilty as to all. ni one. as to y^t in Justification (y^s is good pleading) again ap^rsumsit for 1000 dols. as to 500. "non ap^t" as to y Residue setoff, payment.

But all y pleas taken together must cover y whole ground of action -

If however matter pleaded, as an answer to y whole. declⁿ or grievance, is in Law a good answer. to part only. y plea is bad of course for y whole. (and is y subject of a demurrer)

Thus in an action brot vs a Bailee, for goods delivered to him, to keep and carry, a plea to y whole. y^t he was discharged from keeping gm. is ill. for it don't answer his obligation to carry. 4 Bac 88. Hob 28.

And every plea to y action is taken as a plea. to y whole alleged cause of action, unless expressly limited to a part.

So on y other hand, if matter not be a
 satis answer to y whole in Law is pleaded to part
 only, y plea is bad. *Lover. 130. o. 71. Talt. 179. 4 Co 62.*
1 Tamm 28. Cro E 268. 330. 434. Cro J. 27. as
 Suppose A sues B in assumpsit for 100 £
 and B pleads as to 50. £
 part and parcel
 of y whole, a receipt or Release, of all demands,
 wth further answer. This plea wd have
 answered for y whole, but being pleaded for
 a part only, is ill.

80. So an action for words. "She is a thief and
 stolen 20. doll^s." is plea, yt she is a thief and stole
 2. hens. ⁴ill. - 4 Bac. 89. Cro J. 676. 2. Rolle 414.

As to y mode of Taking advantage of such
 Pleadings.

If y Plea begins as, (i.e. parson to v.) as an
 answer to y whole scd^t, and is in Law, good as
 to part only, Pl^{ff} may demur. For there is an answer
 to y whole, tho an insufficient one. As a declaration
 for Assault and Battery, and mayhem, a Justification
 pleaded to y whole, stating facts, not in Law
 Justify the Assault and Battery only. For instance
 if it shd be pleaded, a right to arrest, and "manus
 molite, imprisonit" 1 Tamm 28. n. 3. (3) Talt. 179.
 La Ray 331. L. 383. ³⁰³ Lover 130. o.

But when a defence is pleaded in answer to part only,
 and in Law is in answer to part only, it is a
 discontinuance by the Def of his defence.

This is not demurrable. It is, as if he pleaded nothing
 and Pl^{ff} is entitled to obtain a "Nil dect"
 The Pl^{ff} not only need not demur, but must not

demur. For if he demurs, he accepts an answer to part for y whole. As declⁿ as above, and some Justification pleaded as to y assault and Battery, only, and no answer to y Mayhem. y Plt^y shd not demur, but take Judgment as by "Nil Dicit" 1 Saund 88. n. 3 Faltk. 179. 80. Ld Ray 231. 841. Str 302. Yelv. C. b. 110. 158. Lawes. 135. 6. 4 Co. 62. for he is not bound, and ought not to accept an answer to a part only, and may therefore treat it as no answer. If he demurs y whole action is discontinued: 1 Saund. 28. n. 3. for by thus consenting to try y sufficiency of a part only of his cause of action, he waives it as an Entire right, and refers to y Ct. y decision of only part of it - wh cannot be done.

For a Ct of Justice will not try an aliquot part of a claim; it cannot give Judgment on a part only of the alleged Claim - or cause of action, it must in some way, extend to y whole.

Suppose y matter pleaded to a part only, would have been good in Law. for y whole. (p 79), can y pl^ty demurr? or must he take Judgment. ut Sup? 1 Saund 28. n. 3. Lawes 130. 2 Boff. 426. 1 Sel. N. P. 4. n.

He must take Judgment by "Nil Dicit". I conceive, 4 Co 62 Str 303. 1 Saund 28. n. 3. - For tho' y matter might have constituted a good answer to y whole, yet y^e is actually no answer, but to a part. as Trover for 10 horses, plea as to 5 "not guilty" or Licence, and no reply as to y others 5. If Judgment shd be given as to 5. only, y cause as to y remaining 5. wd remain unsettled, and thus the Judgment wd not settle y cause -

To decl^y for assault and Battery, and Mayhem.
 and a "Non assault & Demesne" wh is in Law
 a Justification of y whole Pleading, as to the
 assault and Battery-only. and no answer as to
 y Mayhem. 2 B et P 427. The Ct held, yt y Plt^f
 might demur, wh seems to disagree with my
 Law. That Plea. however was incongruous, y two
 ends were inconsistent and unlike.

The Law is differently laid down in y Books.
 but I conceive, it makes no difference, an y defence
 is in Law. and in answer to y whole or
 part only. where it is pleaded to Part only—
 1. Selwin, N. P. 4.

Tho if a Plea began thus (see sup. to pg) expressly
 answers the whole, y Plt^f may demur Specially
 for its inconsistency— 2 Boro 427. Lawes 136.

These Rules do not require y def expressly
 to answer such parts of y declⁿ, as are not
 material, or not of y "gist of y action—

As matters of Inducement and aggravation— need
 not be answered. 1 Saund 28. n. 3. For a Plea,
 wh answers y Gist of y action, covers all
 matters of aggravation—

As in Trespass for Breaking and Entering Plt^f
 house, and expelling therefrom and beating him—
 A plea. wh justifies y Breaking and Entering, is
 a sufficient answer to y declaration, i.e. it
 will in demurrer. defeat y action, & if y pleadings
 go no further, and will at all events defeat it,
 in y plea is destroyed by the Replication. i.e.
 by novel assignment in y replication, stating
 y as a Substantive ground of Recovery.
 For y Expulsion is only aggravation—

What will be y condition of y Question, if D had a right to break and enter? How is y Plt to obtain reparation for the ^{beating} Breaking and Expulsion?

A y Plt is to answer by "novel assignment" of a "novel" in his replication, where y Entry is Lawful, and "assignment" y expelling is "forcible" as in y case it supposed be. 3 TR 292. 1 Do 479. 636. see 4 Co 62. Lawes 136. 1 KB Bl 555. 2 Wils 20.

What is a Novel Assignment? see. 3 KB 311. his definition is imperfect. 1 Faunt 299. a n. o. S. Bac 213. Lawes 70. 163. 240. 197. It consist^g. in alleging with all necessary circumstances in y replication (in answer even to an Evasion Plea) what is alleged in y declⁿ generally, or in stating as a Substantive trespass, or ground of claim, what upon y face of y declⁿ, appears to be mere matter of aggravation or matter of mere aggravation, as above. or finally in stating as a cause of action, a transaction distinct from yt to wh y plea applies. Either of these 3 diff^t statem^ts in replication may constitute a "novel assignment"

As declⁿ in Trespass, plea. licence at such a time, replⁿ stating trespass of y same kind with different time — ^{Escape} Ad again of Novel assignment declⁿ for an Escape, plea recaption on freest suit — Replⁿ Voluntary Escape. 2 TR. 125.

When Plt makes a Novel Assignment, def may plead again in Bar. "Not Guilty" — to "Novel Assignment", def may plead as to a declaration — as General Issue. Lawes 108. 1 Faunt 282. 3 East 384.

A novel assignment concludes with an averment, y^t y trespasses, or wrongs described in it, are different from those mentioned in the Plea. Otherwise a new assignment, is unnecessary. for if they are not different from y former, they stand justified in Law. by the plea already made. Lawes. 164.5 240.1. 1 Pound 299. n.

The averment cannot be distinctly traversed. If it aint true, def shd plead "Not Guilty" to y new assignment Lawes 291. 1 Pound 299. n. 5. and y^t involves a denial of the averment, it being a demurrer y^t y def is guilty of a wrong different from y^t admitted and avoided in y plea. in "Bar" For the form of a novel assignment see 2 Ch. Pl. art Novel assignment.

General Pleading— It was anciently necessary, for def to set forth Specially, all particulars however, numerous. of a defence consisting of Special matter of avoidance. Co Litt 303. & Co 133. 4 Bac 90.

Now, however, general pleading is sometimes allowed to avoid prolixity. As when y particular facts, if Specially set forth, would. (to use La Cokes Language) tend to infiniteness. This, however, is only an Exception to y General Rule. — Two Examples will illustrate y General Rule of the Exception.

An Ex^r covenants to pay all y Legacies in y Testator will, in pleading performance, he aint allowed to plead generally, for it is presumed, y^t y Legacies in a will cant be very numerous. He must state each Legacy Specially, and y^t he has paid ym, and y^t they are all.

on the other hand, suppose a Sheriff gives a Bond, to discharge all his duties: now he need not plead specially, & performance of each official duty - yet wd be morally impossible, he is allowed to plead Generally. yet he has performed all his duties - 2^d Ex Case of a Brewer, who agreed to convey to B. all his grain for a number of yrs.

Again if one is bound to perform contract, & performance of wh. must consist of a great variety of facts. he may plead performance generally - 4 Bac 91. Contra 1 Cr 574. 9. 910. 1 Sid 215. 231. 215. & 234. Co Litt 313. 2 Vent 208. See Covenant Broken) Corp 370. Lawes 601. Pund. 117 n. 1. 2 Do 410. n 4. 1 TR 753. The Rule. then where well laid down by B Butler, see Covenant Broken. But this cannot be done, where some of y Covenants are negative, for negative cannot be performed, as to these he has not done y act, covenanted to. see Covenant Broken. Co Litt 303. Cr 691. 4 Bac 91. 5 Com 236. 206 303.

In y^e case, if def plead performance, advantage 82. can be taken of it only by Special Demurer. Cr 252. 5 Com. 82.

Def need not allege more in his plea, in what amounts "prima facie" to a sufficient answer to the declⁿ ante? La Ray. 400. 2 Mil 100. 1 Pund 298. - He need not therefore negative by anticipation, possible answers to his Plea. 2 Mil 100.

Repugn^y All pleadings on either side must be consistent with itself. Hence a repugnancy on a material point, radically vitiates every plea. Secus if in point not material. Is then treated as Surplusage. A formal defect can be taken advantage of by a Special demurrer.
 2 East 333. 4 Bac. 94. Co Litt 303. Com. D. 9.
 Lawes 64.3. 170. Gill & Pp 132. Fath 320.
 1 Mills 98.

Repugnancy of date in a Record, is no Error after verdict. It is not of y substance of y Record.
 2 East 333.39. See Trover and Greeting, for Postea Scil and y Scil rejected.

When a def justifies under a writ, warrant, or any other authority, he must set it forth Specially. alleging, yt he acted by a certain writ, and so forth, ant sufficient. 1 Saund 298.
 n. 2 Do 402. n. Co Litt 283. 3 Mod 137. 8.
 Fath 178. 4 Mod 378. Com Pl 317.

For y matter of y Law must be Specially shown to y Ct. Hob 27. 290. 4 Bac 60. ante 72. 67.
 and see also Covenant Broken.

Form of beginning and concluding Special pleas in Bar. Repl^y see 138. 149. 159. 161.

Decided by Ld Mansfield, yt "actionem non" goes in every case to y time of Pleading - not to y commencement of y action.

Doug. 108. 12. vide 2 H Bl. 143. But yt it seems ant true in all cases. Lawes 138. 9. 3 TR 180.
 as plea of Petiff. Comp. 590. see precedents of this Plea. For y Pltf must aver. yt y bltf was indebted to y def before, and at y

time of y commencement of y Tuct. 3 IR 186.
2 Ch Pl. 463 or 43. or 33. 449.

"Onerari non Debet" may be pleaded instead of "actionem non" when y plea shows. yt there never was a cause of action -

Pleas when it admits, yt there was once a cause of action. Lawes. 139. Salk. R. 576.

This must be - because y former is construed as denying any original cause of action, or Liability - and y latter as denying an existing cause or Liability to y action. or existing Remedy.

Plea when aided by Replⁿ see Com. Pl.

2.7. or 37

Traverse

wh

A Traverse in y language of Pleading, is y denial of some particular, (point) fact or facts alleged in y Pleadings by y other party, and always tends an Issue - may be taken to any part of y Pleadings -
4 Bac 87. Co Litt 282. Gild. 195.

When a Traverse is preceded by Special matter, by way of Inducement, it is called by Lawes a Special Traverse - (not so see Lawes. 116. 8. 21. 49. Does not y Extent of it decide its Character? It does - when preceded by an Inducement, it is properly called a "Technical Traverse", but it isn't necessarily a Special one - It is somewhat, yt so accurate a writer shd have cried, as to y "General and Special Traverse". He has confounded y words. Technical and Special

When a traverse taken on one side, denies y whole
alleged on y other, it is called a General Traverse.
If taken on part only of what is alleged, it is
called a "Special Traverse".

It is sometimes said in y books, yt a traverse
closes the issue 4 Bac 67. But y^e as a general
proposition is incorrect - Tho' as an Exception to y
General Rule - it is sometimes true - The issue
is closed. (when triable by Jury) by concluding
to y country - It is joined by y opposite parties,
adding the Similiter. (of wh Post")

A Technical Traverse with y words "absque hoc"
concludes regularly with a verification, and if Special,
it always does. 3 Mod 203. 4 Bac 67. 6 Co 24.
5 Com 109. 1 Str 87. 1 Burr 321. Doug 412. Lawes 121.
1 Tamm. 103. b. n. 3. In y^e case, it does not close
y Issue. As A alleges in his plea, yt D died
seised in fee. &c. deducing his title from him.
The other party says, he died seised in Tail, "absque
hoc." yt he died seised in fee, with a verification.
When taken in y^e form, it only tends an Issue.

* These are technical Terms, in Pleading, equal to "not
or et non."

The words "absque hoc." are technical words of denial,
but they are not indispensible "et non" are veter.
Lawes 119. 1 Tamm 22.

We are told in y books yt a General Traverse,
may conclude in many cases, with a verification -
or to y country. I conclude or conceive, it ought to
conclude to y country always, as - "De injuria
sua propria absque tali causa" and y^e concludes
to y country - 4 Bac 67. 8. 1 Tamm 103. b. n. 3.
2 Ark 364. 1 Burr 317. Doug. 90. 412. Salt 4. 7 Mod

Such a Traverse cannot be ill, as being immaterial, § 84" because it denies all yt is alleged on y other side ante 60. and can't be necessary or proper for y adverse party to answer with Special matter— for it tenders an Issue, ante 64. wh cannot be refused by y other party, since it extends to all yt he has alleged—

That "atque Sali causa" refers to all, yt is alleged by y other side. see Lawes. 152. 8 Co Co 67 Lawes 154.

Under what circumstances, a General Traverse may conclude with a verification. 2 J.R. 443. 2 Burr 1022. 1 Saund 133. a b. no Layer has attempted to point out. tho J Boul. 2 J.R. 443. has said. yt under certain circumstances, it was allowed—

The conclusion with a verification in y place Saund 133. a b. 1 Lawes 121. is vindicated only by precedents wh originated in a mistake, for how can it be proper to conclude with an averment, in any case. when all y allegations on y other side are denied? and none tenders upon ym? The opposite party cant possibly make a Special answer. and he ant ^{fore} concluded by y conclusion from demurring, if he chooses to do it—

The general replication "de injuria sua" propria absque tali causa" is appropriately adapted to answer matter of Issue. Lawes 154. o. Tho it is a good answer generally to a Justification consisting merely of fact. Lawes 155. o. & Co o7. and not containing matter of Record, right, Title or Interest, all wch are matters of Law. Lawes 155. o. & Co o7. Com 162. f. 20. 1.

For as to these a General Traverse is altogether inappropriate, as it don't separate mere fact from matter of Record. &c. but denies both, without distinction. Lawes 154.

But tho y Replication "De Injuria &c" concludes with y General Traverse. (absque tali causa) is not proper when part of y Plea consists of matter of Record. &c. but even in such a case, the Pltff may reply, "de Injuria &c. and conclude with a Special Traverse. of any one material fact, or point in the Plea by itself, as the Record &c. for he thus avoids y inappropriateness of y General Traverse. "absque tali causa" Lawes 154. & Co 67. by separating y matter of mere fact from y matter of Record. &c.

Whereas "absque tali causa" traverses all yt is alleged. on y other side. Lawes 152. Thus to Assault and Battery and wounding, if Def justifies under a writ or warrant, and alleges Resistance by Pltff, & Pltff replies, "de injuria sua propria absque tali causa", he traverses both y Resistance and y writ, wh is improper. A traverse of either wd be sufficient: but y General Traverse wd put matter of Record in issue to y Jury, as well as matter of fact. The Pltff sha therefore

traverse y one or y other by a distinct Special Traverse, who would refer y matter of Law to y Court, or y matter of fact to y Jury. Lawes 154. But y General Traverse blends ym. into 178.9.

And "de injuria" may be replied in its general form. to a plea, alledging matter of Record. Title, Where such matter is alledged by way of Inducement, only. Lawes 156. Com PL. 7. 20.1. 1 Burr 320. 8 Co 67. a. For then it is not distinctly traversable, not parcel of the Issue.

A Technical Traverse. I have observed already, is preceded 85 by matter of inducement, and differs from a direct and positive denial (i.e. *absque hoc*) by a common negative, not only in diction, but generally in y conclusion. The latter is y same ^{more} proper mode of denial. when y party tendering y issue, has no occasion to introduce new matter before it. 2 Saund 205. b. 2. 210. n. 1022 1 Do. 203. a. and b. 2 N.R. 264. n. As suppose to an action on contract, y def pleads Money. There are 2 modes of Traversing - 1st Repl^{ty} "good and Lawful consideration" "*absque hoc* yt it was correctly agreed. and with a verification 4 Bac 07. 77. 2 Burr 422. Ray 38. 2 T.R. 434. 2 Str 871. 1 Bul 321. Lawes 115. b. 149. 45. 2 N.R. 314. n

2^d It was not corruptly agreed, and concluding to y country. This forms a complete issue, and is it itself sometimes called an issue, as distinguished from a traverse technically so called. Lawes 117.

This latter mode of traversing, always forms a complete issue, and always concludes to y Country. Quere. an a wrong conclusion is ill in these cases is ill on General Demerit? It is kata

to Raymond. 94. Cro. El. 117. 164. Subversus ventris 240.
Hew 40.

In Raymond is 1000 on bond, conditioned to pay
certain sums. Def pleads yt he had paid all.
Plt. replies, yt he had not paid all, with a
verification. Holden Ill on General demurrer.
It seems, yt it was ill on General demurrer.
before y St 4. and 5th ann. b. 16. wh La Holt
called y Inimptent. St. 3 Mod 203. 2 Saund.
190. n. 5. Secus since yt St. It is ill (under
yt St) only in form. and can be reached only
on Special demurrer. 1 Saund. 183. b. 205. n. 5.
bost 88. 3 Mod 203.

When an allegation on one side is Expressly denied,
on y other, in com neg. Language, y super addition
of a Common Technical Traverse, is unnecessary,
needless ergo improper & demurrable.

86. For there is a complete issue witht y^s addition.
Secus y parties might answer "in infinitum"
As Plt avers performance of a condition precedent,
y def directly denies it, by saying, yt y pltf did not
do. There is a complete issue. Superadding a
Traverse of performance, by an "absque hoc" is
improper. 4 Bac 67. Lawes 117. 2 Str 871.
Cro E 735. 1 Vent 101. Ray. 98. 2 Saund 188.
As to y conclusion of a Traverse. Averment and
verification are synonymous.

Note on the subject of y conclusion of Pleas. y
word "Averment" is used in y same sense with
y word "verification". It means, y Averment,
"Thus he is ready to verify" ante 61.
but for most purposes. it is synonymous with
allegation.

General Rule, when one party alleges new matter, wh is inconsistent with any of y antecedent traversable allegations. (1st. wh if found either way upon issue joined, wd be denied) on y other side, but wh does not form an Issue, - a traverse of these allegations is not only proper, but necessary. - Otherwise y parties might plead "in infinitum" w/out forming an Issue. - As Thus. a def pleads, yt his Co-def was dead. at y date of y writ. - then if Plt replies, he was alive - altho y plea is directly repugnant to y other, yet it does not form an Issue. - Hence a Traverse of his death with an "absque hoc" or "et non." is necessary. 1st. traverse yt he was alive "absque hoc" yt he was dead.

So. def alleges, yt I & I died seized in Fee, Plt alleges, he died seized in Tail - Here he must traverse yt he died seized in Fee. - 4 Bac 67. 8. 70
Lawes 117. 8. 150. 1 Mil, 253. Hob 103. 1 Panna 22. n. 2.
2 Do 107. c. n. 4. 209. n. 8. Cro C 30. 3 Bl 310. 1 Sid 301.
1 Vent 201 213 2 Mod 68.

The new matter wh precedes y Traverse. is called the Inducement to it - Lawes 117.

So y General Rule. There is one Exception -

87.

Whenever in answer to a Negative allegation, it is necessary for y Party, to set forth affirmative matter, specially to make out his case or defence, he can't conclude with a Traverse of his Negative-allegation, tho' y new matter is inconsistent with it. - See B et P. 362.

Thus in debt in arbitration Bond, if def pleads
 "no award" Plt' may reply "an award" setting it
 forth and assigning a breach, but he does not
 traverse y plea. Tho his allegations are inconsistent
 with it. Ch. Pl 187. Lawes 100. 6 East 566. ¹⁰²⁷. Hob 233
 for he must plead y new matter Specially, to make
 out his own cause of action, and conclude with
 a "verification" and of course ^{leave} it open, to
 be answered by the def- ante 8. 77

This Exception is "Ini Generis" Why we may ask,
 does not y Rule hold in y case? Answer, there is
 no cause of action, ni y award is alleged, it is
 new matter, and consequently y pleadings must be
 left open-

Mr Lawes, has repeated a proposition of La Hobart,
 yt a Special Traverse without proper Inducement,
 would include a Negative Pognant. Lawes 118.
 see p. 120. top of y page- But y Rule is
 by no means universal- It holds in general
 only, where y Traverse, taken by itself, includes
 circumstances, or particulars, yt are not material-
 2 Saund 188. 9. 1 Do. 103. Willeys 318. Dyer 280. 15. 312.
 90. Story 24. Com P. G. 20. 3 ~~Mott~~ 16. Hob 321.
 in wh an inducement is necessary to limit its
 extent, and application. Lawes 121.

The Rule is really incorrect- It would lead y
 party traversing to employ an Inducement of course
 an necessary or not. The Truth is, there is no
 such General Rule, as yt stated by Mr Lawes.
 As in an action of Battery, plea "mollior manus
 improbit" Replication, outrageous Battery- &c.
 here y Inducement is necessary-

"E converso" Plea. P. is dead, Replⁿ "not dead"

no inducement is necessary -

But all yt is necessary for y Pleader to do, is, first, to ascertain, an y traverse without an Inducement, wd be a "negative Pregmant", if it would be, necessary, to precede it with an Inducement.

Aliter an Inducement is Surplusage - as plea-
tion. Consider of D. P. as def. who is still alive -
and Pltff may reply, "he is not alive" without Inducement.

So pleas of Title by devise from D. P. alleging
yt he died seized in Fee - Replication, yt he
did not die seized in Fee - is good -

When a Party confesses, and avoids by new matter,
y adverse allegations, a Traverse is improper -

For what he alleges, is not inconsistent with y
adverse allegations - Indeed a Traverse wd be
inconsistent with his own Pleadings -

For he surely cannot traverse or deny what, he
has already confessed - As In action on contract,
y def pleads "In fancy" - The pltff replies, "he
made a promise to fulfill, after full age -
here he cannot traverse, having made a
virtual confession -

So plea of "Release" &c Replication, "by Durety"
or "per fraudem" Traverse wd be improper. - 2 Bac 70.

Co L 387. 10 Co 57. Co J 221. 2 Mod 108. 11 Blac 309, 12 Mod 208

1 Saund 22. n. 207. & n.

The replication in these cases, as it contains new
matter, must coincide with a "beneficial" without
a Traverse. 3 Bl 309. 1 Saund 115. 11 Mod 203. 1 Saund 22.
n. 2. 10 Co 57. n. 3. 1 Saund 207. n. 5. 209. n.

Traverse in y last case ill, on Special demurrer only:-
 1 Tinn 21. n. 1. 207. C. n. 4. 6. Co 24. 6. Cro. J. 221.
 Cro E 161. Yelv. 157. East 166. Post 92.

Traverse preceded by Inducement, is but a conclusion of fact, from y Inducement. (Post 96) 18. when both go to y same point - as Jf. Jf dida sewid in Tail - "absque hoc" yt he dida sewid in fee -

88.

When a Traverse with a verification is intended, y issue is formed by y opposite Party, affirming over, what is traversed and concluding to y contrary -
 4 Bac 67. 8. 1. Salk 4. Co Lite 126. a. Lawes 149.
 This affirming over. is a repetition of former allega^{tion} -

An issue joined on an "absque hoc" ought to have an affirmative after it" (note y words "after it" mean after y "absque hoc" Co Lite 126. a. 4 Bac 68. a. 6 East 565. 7. 1. Cr R 587. It must be traversed with a direct affirmative. Lawes 121. As otherwise y Traverse would consist of a double negative -

As suppose Def. pleads. yt Co Def was not living - at y date of y writ, now Plt can't plead he was living, "absque hoc" yt he was not living - He must conclude with a direct affirmative, for y "absque hoc" is precisely equivalent to saying, yt he was not living, and the Rules of Pleading won't allow such complicated Pleading - or language. 2 Mod 46. 4 Bue 70. 4 Burr 103. b.

Again plea. Release. - Replication not voluntary &c. but by duress. - Reply with an "absque hoc" yt it was not voluntary - Traversed in form, because it contains 2. negatives, instead of one affirmative -

So - plea. yt plty did not give def notice, ~~and~~
"replication abque hoc"

Note an instance of a "Negative Pregnant" is here
given, wh was omitted in y proper places.

See p 117.

The def in an action on contract, pleads "usury"
and says. yt "it was corruptly agreed to pay 10. per cent."
"This implies a negative Pregnant, yt it was"
comptly agreed to take 9. (or y) per cent.

To Return - The omission of a Traverse, when necessary,
is said to be matter of substance. 4 Bac 70.

2 Mod 50. 1 Leon 43. 4. At C Law it was so -

But by the St 4. and 5th Anne - it is matter
of form only. 1 Saund 103. b -

If def in traversing y Pltfs Title, shows in y Inducement
a defective one in himself - i.e. a defective defence. his
plea is bad. Lawes 118. Com Pl 920. Cro E 336.

General Rule - There cannot be a Traverse upon
Traverse. when y first is material - A Traverse
upon a Traverse is a subsequent Traverse, going to
y same point as is embraced in a preceeding
Traverse on y other side -

By y^e Rule... is meant, then, yt when one of
y Parties has tendered a material Traverse, y other
must join in it, and cannot leave it, and
tender another upon the Inducement to y same
point - i.e. y same ground of defence or claim -
4 Bac 87. 8. 73. 9. Co Litt 282. Hunt 79. Hob 104.
see particularly for a full illustration - 5 Com 110.
Com. D. 62. 9. 17. 2 Mod 183. 1 Hen Bl 403. Salk 222.
L Ray 121.

If it were otherwise - they might go on indefinitely - as Pltff claiming from D. pleads. yt D. was seised in fee. Def replies yt he was seised in Tail - "àtque hoc" yt he was seised in fee. Now Pltff must join in this issue, and cannot traverse y Seisin in Tail -

After they might answer "in infinitum" without meeting -

Here both Traverses go to y same point & title, both embrace y same question, an he died seised in fee or not.

But a Traverse after a Traverse is good, even tho y first is material. 4 Bac 73 Hob 104. Co Lite 282. b. 5 Com. 120. Popham. 101. Com D. bl. 9. 18.

What is y difference between a Traverse upon a Traverse. and a Traverse after a Traverse?

A Traverse after a Traverse. is one. which doth go to y same point, i^e y same fact, or ground of claim. or defence) as is embraced by the prior Traverse. on y opposite side, but tender an issue on a different point - Hob 104. 1 Ch Pl 535. 2 Do 265. Com D. bl. 9. 1. H.

Suppose A brings an action vs B. for entering upon his Land. B pleads. yt he entered on his Land. y first of July. having a Licence from A. and concludes with "an àtque hoc" yt he didn't commit Trespass. on any day after or before y^e day -

Now pltff may do one of 2 things - either traverse y Licence, or join in y first traverse, not alleging. yt y Trespass justified, and yt complaint of. are y same. i. satis - 1 Saund 298. m. 2 Cro C 228. M^d on a different day. (post 94) see

Hob. 104. For these distinctions and explanations of ym-

Now a traverse upon y license, is not a traverse upon a Traverse, but a Traverse after a Traverse for it goes to a different point

Again in an action of Trespass the Deft (J Collins) pleads a Release on y 1st of June, y is not enough. he must superadd an "abque hoc" y^t he committed y Trespass on a subsequent day. Now y Plt^y is at liberty to either join in y issue tendered, and to traverse y Release. If he could not traverse y Release, he might lose his case of False Inducement.

So in an action of Trespass Def pleads Tresp. to himself on y 1st of August, and traverses a Trespass on any previous day. here y Plt may traverse y Tresp.

This is not however y best mode of pleading, The more simple and better way, is to plead (in such case) Specially only as to y part justified or considered, and y general issue to the residue, and put himself upon y country, instead of concluding his Special matter with a Traverse. As Trespass "Dare Clausum fregit" Plea, as to any trespass since such a day, "Not Guilty" as to any before "Release" If however y day laid in y Justification, is y same as y^t in y declaration, no Traverse is necessary or proper: y Trespass alleged and y^t Justified being "prima facie" y same. 1 Ch. Pl 35.

There cannot, as has been observed be a "Traverse" upon a Traverse, when y former is material, But there may be a Traverse upon a Traverse, when y former is immaterial.

This is not strictly an Exception to y General Rule, as the general Rule runs. a traverse upon a pro material Traverse. This Traverse upon an immaterial, may be treated as a mere nullity - & a traverse tendered on the Inducement -

4 Bac 73. Hob. 104. 5 Com 120. 1 H Bl 376. 406.

Str 117. Co Litt 282. 6. Cro E. 99. Carth. 116. 1 Saund 20. 22. n. 4 Y R. 440. 6 Co 24.

As Trespass for cutting and selling trees. Def pleads Special matter, as y^t he cut for y Plt^f use. and by his Licence. and traverse y Selling. Hob 104. Here y Def traverse y fact of selling ym. but it is an immaterial Traverse. & y Plt^f may pass it over. and traverse y Inducement or y Licence.

In y^e case as def does not justify for any particular day. he does not traverse as to any other time, and ergo y trespass justified, is taken to be y same as y^t complained of -

Lence y second Traverse, is a Traverse upon a Traverse. post 92. post 134. ante 87. or Plt^f may demur Specially for y^m materiality of y 1st Traverse - 1 Saund 21. n. Cro E. 221. 2. Gels 157 151.

90. ^{false} But there is one flat Exception to y General Rule, viz in y case of Foreign pleas - as when Trespass for Battery, laid in y county of a, Def pleads a Local Justification in y county of B. (as the authority of a Sh^{ff} in y^e county & a right to arrest) with an "absque hoc" y^t he committed it in a.

Here (y Justification being Local) y Plt^f may leave y Trespass. (tho' it includes what is material viz y Trespass alleged) & traverse y Justification

For supposing such Justification to be false. and yet
Pltf ca not leave y first Traverse, and take issue
upon the Justification; it must follow. he must be
deprived of y right of choosing his venue in transitory
action, or be defeated by the false pleadings of y def.

Thus suppose in y cases stated, yt the Trespass was
committed in B. and not in a. still Pltf has a
right to sue and recover in B. But this he ca
not do. if he were obliged to join in def's traverse.
by affirming over, yt y Def was guilty in y county
of a.

This Exception to y General Rule is necessary to
defeat foreign Pleas, when false. 1 Ch. Pl. 597.

Com. D. pl. 9. 18. 4 IR 439. 5 Do 367. 1 H Bl. 403.

4 Bac 73. Poph. 101. Cro E 99. 418. Lutwin 1437. Cro C. 105.

1 Landa 22. m. 2 H Bl 102.

The pltf in y above case may join in y Traverse.
and affirm, yt he did arrest in y county of a -
and conclude to y County. Or he may leave y first
Traverse, and traverse y Justification in y county of B.
denying, yt the Shff was a Shff. Potham is y
principal one. (Supra)

The better and more simple way. for y def. to
form his Plea. wd be. thus, "as to any trespass
in y county of a" Not guilty" ~~not~~ to any trespass
in y county of B. he may plead his Justification -

When y matter alledged in y declⁿ, as y cause
of action is, in its nature divisible, so yt Pltf
is entitled to recover. for as much. as he can
prove Little to, (tho less ym y demand)
Def cannot make yt, part of his plea,
wh is in answer. to a part of a cause of action

in inducement to y Traverse of y Residue -
 A debt for 100 \$ - Plea. payment of 50 \$, which was
 y whole debt, "atque hoc" yet he owned any more.
 He shd as to 50. plead payment by itself Specially.
 As to y Residue, y General Issue - 1 Anna 26, y
 Lawes. 118. Sect 220. Com. 50 y. 20.
 For supposing the Traverse to be true - y pltf may
 still have a right to recover for y part not traversed
 & yet if he were obliged to join in the Traverse, he
 would be precluded from denying the Payment,
 and thus for claiming for yt part.
 If def would take advantage of y payment of 50.
 \$ he must plead payment of yt sum -
 and for y Residue "nil debet"
 In these cases, now bereve, y pleadings go to one
 point.

In y other hand, when the Traverse and its
 Inducements go to different points, joining in the
 Traverse. admits y Inducements; when they go to
 one, and y same point, and are properly adapted
 to each other joining in the Traverse does not
 admit the Inducement, because in such case, y
 Traverse is but a consequence, in point of fact,
 from the Inducement.

Thus if y whole debt was but 50. Dole. y allegation
 of payment may be False. Suppose it false, yet
 if the Traverse was good, y pltf must join it,
 & be defeated by a False Plea, as he could
 not contest y alleged payment in Tri -

Or Suppose y allegation of Paymt. and Traverse,
 both false (i.e. suppose no payment, and y whole
 debt above 50. Dole.) in y case, if y pltf joins
 in the Traverse, (as he must, if it is good)
 he cannot in Tri' contest y false allegation of paymt.

(as before) and if he might ^{shd.} and traverse y alleged payment, he cd not under yt Traverse, go into y proof, yt y debt was more ^{than} 50. Dols

If y plea were good, he cd in no possible way answer it w/out prejudice, tho it were entirely false. The plea must therefore be ill.

So in a case for obstructing³ Lights, Def justifies as to 2. "abque hoc" yt he obstructed 3. y plea is bad.

He shd plead y general Issue as to one, not Justification. In these cases, if y Traverse were good, y pltf would be obliged to joinⁱⁿ it, and wd thus be precluded from answering as to y part covered by the Inducement.

In order to be clearly understood, and yt it may be clearly remembered I repeat.

When a Traverse and its Inducement go to different points, joining in y Traverse, admits y Inducement. (as ante, a Traverse after a Traverse)

Aliter if they go to y same point and are adapted to each other. ante 64. 88. 91.

Indeed when y Inducement and Traverse are properly adapted to each other, and go to y same point. Joining in y latter, implies a negative of y former. For y Traverse is, but a conclusion from y Inducement. ante 78.

For y purpose of avoiding y facts alleged in y Inducement, a protestation is sometimes used. 4 Bac 68. n. But it can answer no purpose in y cause, in wh it is used. (infra) for y subject of y Protestation "in Issue." Indeed y

protestation itself is no part of y Pleadings.
 173. chs Lawer 141. and in this case. principally I suppose,
 a protestation is wholly unnecessary, since by y
 supposition, y allegation to wh it is taken, cd not
 be denied by pleading - and therefore no answer
 to y protestation is necessary. Lawer 143. Com D. pl.
 n. 4 Bac. 73. n. and indeed admits of no answer -

A protestation - what?

As defined by La Coke, it is "an exclusion of a
 conclusion" Co Litt 126. 3 Bl 311.

But y party tendering y Traverse, admits of course,
 all traversable allegations, wh he does not
traverse - For he is at liberty to deny what he
 pleases (pleads) 4 Bac. 2. 73. n. Salk. 91. 1 Mil, 338.
 ante 5. 77

For him. therefore, a protestation may answer
 a very valuable purpose, for he may avoid
 or exclude any such such admission (so far
 far as respects any claim in a future suit -)
 by protestation. and in y case a protestation
 may be useful and important for y purpose
 of excluding an Estoppel, wh y allegations not
 traversed, might otherwise constitute -

But y protestation does not oblige y other
 party, to prove y allegation protested vs.
 but as to y principal case admits ym.
 Lawer 141. 3. 2 IR. 443. 4.

It merely prevents those allegations in y Plea
 from being tri in any other case. (as y party
 protesting,) of y facts to wh y protestation extends
 4 Bac 73. Co Litt 126. 2 Burr 1023. 5 Com 126
 5 Mod. 136. Litt 192. 3 Bl 311. Lawer 144

The def, when he protests vs y allegations, does in common language. "Now there are 2 or 3 of these allegations, wh I have no objection to admit in order to decide y present case; but I don't choose to have y admission to appear on the Record. So as to injure me in any future case.

A protestation may be of use, either to y party traversing, or to y other Party joining in y Traverse. This is y only method of denying y allegations not put in Issue. Lawes 114. Plow 267. B. n 276

A Repugnant protestation does not vitiate y plea. for in strictness, it is not a part of y Plea. Lawes 142. Com. D. n. 2. Pleadings. And in general a protestation does not avail y Party protesting in any way if y issue is found vs him - Lawes. 142. wrong.

But matter, wh might be excluded by Protestation, may if not so excluded, conclude y traversing party, in future controversies, tho' y issue be found for him. 4 Bac 73. n. Lawes 141. Litt 192. for it appears, by a Record to which he is a party.

It is a Rule, yt a Traverse can only be properly taken on a material point - (i.e. one decisive of y cause. Lawes 118. 1 Role 235. 6 Co 24. a. Carth 217. n 371. Of however, y adverse party will demur to it, as being immaterial, his Demurer. must be St 27. Elix. and 4. and 5. ann. Ch. 16. be Special. 1 Saund 14. n. 21. n. 2 Do 207. ^{15. y. h.} b. 2 Str. 694. 2 Saund 319. a. b. (for St 27. Elix see 4 Bac. 133 - for St 4. anne. see 1 Bac 94. d. Contra. 817. 8. at C Law an immaterial Traverse was ill on General demurer. Yelv 195. 2 Saund 207. b. post 113. 14.

And yet if y party, to whom y Traverse is
tendered, joins in an immaterial Traverse, and
a verdict be found by him, Judgment will regularly
amended, and a Repleader awarded. 2 Saund 319.
a. n. o. 1 Str 228. n. l. Crok 371. Cro J. 434. 585.
Salk 330 post 134.

This as y case might be, a verdict upon such an
issue would be good. For in some cases, a verdict
found one way, will be decisive of y right, when
if found y other way, it would not. Post 137.

But these are cases of mere "Negative Pregnant"
(Post 137 ante 50. o.) Can y verdict, if for y party
traversing, ever be good, except when y issue is
objectionable, only as being a "Negative Pregnant"
I think not, and not always then as case
of contract before in a before I see post 96. 134.
48.

A Traverse can be taken only on warrantable point,
for what is material, is not necessarily warrantable.
The very object of a Traverse is to tender an Issue,
Hence matter of Law, however material, cannot
be traversed. 1 Saund 23. n. o. Plowd 231. a.
2 H Bl 182. As in an action of False imprisonment
Def pleads, y^t he was a Shff, and had a
Lawful right, as such, to arrest y Prisoner,
Here y Plt^y may traverse y fact, of his being
a Shff, but cannot traverse y legality of y arrest
by a Shff. - nor generally matter of Inducement.
4 Bac 68. 81. Lawes 46. 118. Cro E 201. 169. Com bl.
9. 14. Hard. 70. 11 Co 8. b. 1 Saund 268. a. n. 3 Mod 320
Doug. 109. Sack 111. Salk 658. Cro C. 442. Hob 103.
1 H Bl. 376. 403. Cro J. 221. 1 Saund 22. n. 23. Plow. 231.
Hob 103. 4 H Bl. 182. 2 Saund 189. 59

Exception, Com Pl. G. 14. Cro E. 201. Bac. pl. 4.
5.

Not a "per quod" or "virtute" causae" in a Notification -
 as where in Example (given above) y self pleads,
 yt he was a Shff of y county of D. "virtute causae"
 or "Per quod" he arrested y Plff - Now as before
 y plff may traverse y fact, but cannot traverse
 y "virtute causae" 1 Saund 23. n. 5. 298. n. 3. 2 Ray 460.
 or 410. 2 Keb 607. 11 Co 10. 5 TR 60. 66 for y "per
quod" is a conclusion from y facts stated.
 But in such a case. y issuing of y writ may
 be traversed -

A traverse may be taken on a precise averment,
 wh being made. becomes material, tho not
 necessary to have been made. 2 Saund 206.
 n. 207. a. Yelv 195. 1 Saund 340. Lawes 48. Doug.
 640. Brillon as might 3 Bl R 161.

A Traverse may be taken on a single point only.
 i.e. a single ground of claim or defence - otherwise
 it would be bad. for duplicity - This single
 point need not of course consist of a single fact
 but as y case may be. of any number. But
 if there are 2 distinct traversable facts or points,
 either of ym. may be selected, tho both cannot
 be traversed Com D. pl 10. 4. Bac 68. 3. Lev 40.
 1 Barr 320. 1 B et P. 80. 8 Co 56. Baile 93. post
duplicity. Lawes 152. 3. post 100. # The language
 in wh La Mansfield is made to apply y Rule
 in Burrough. is incorrect. The question.
 was not. an y beasts were commonable. i.e.
 of a commonable Species. but an on y fact, they
 were entitled in yt case to Common -

But if 2 distinct points are material, either of ym. may be traversed. Lawes 48. 6 Co 24. b. 1 Mil 338. Lyer 368. a. Com D. pl. G. 10. as plea - award of Arbitrament - The pltf may traverse y submision, or y award.

Nothing but what is alledged, or necessarily implied, can be allege-traversed. 1 Saund 312. m. 4. 206. 2 Do. 10. m. 14. Salk 129. Com D. pl. G. 8 13. 4 Bac 81. This is apparent from y definition, of a Traverse. For a Traverse is a denial on one side, of what is alledged on y other -

There can be no proper issue, but on some allegation - as an action on a promise to pay money, not averred, to be in writing, as by St of Grand. is required to be, in certain cases, y def cannot traverse, yt y promise is in writing - 4 Bac 75. 68. 81. East 99. La Ray 64. 2 Burr 994. Esb 225.

But such a Traverse is ill on Special demurrer only. by St 2d Eliz C. 5. 4 Bac 75. Lutes 935. 1576. La Ray 238. 1 Saund 312. 1. m. 4. or at least by St 4 Anne C. 16. 1 Saund 313. m. 4.

This Rule may seem extraordinary - For if one party traverse what is not alledged, what has yt to do with y merits of y Cause? I answer. yt y Traverse thus becomes, an allegation of Special matter, and not a denial -

Any material point or fact appearing in the Pleading, may be traversed in General. tho it be in form. of an Inducement merely, or suggestion Lawes 48. 2 Saund 206. a. m. 23. 22. Com Pl. G. 11. Cro C 167.

When a party Justifies, or in any way confesses.
 I avoids as to part only of y cause of action, or defence
 alleged vs him, his Traverse or other answer must
 be Coextensive with y part not thus avoided,
 for all y parts are necessary to constitute a whole—
 And all y parts of a decl^r must be answered.
 ante 79.

As in Trespass, if Def pleads a Release, he must
 traverse or otherwise answer as to all y time before
 and subsequent to y date of y writ, for yt period
 is not covered by the Release—

94.

If a Feofment antecedent— If a Release at a
 particular time, all before and after, (ante 89)
 Otherwise part of y cause of action remains
 unanswered. ante 79., or rather part of y period,
 within wh. y Trespass may be proved—

In y^s case, however, if y day laid in y declaration,
 Justification, is different from yt in the declaration.
 It is necessary to be so, y Traverse is usually precluded,
 by the allegation "qua est eadem" &c.

1 Ch. Pl. 534. 2 Ibid 657.

But if y day laid for y Justification, is y same
 as yt. in y declaration, or different without necessity.
 y Traverse, and qua eadem est or "qua est eadem"
 &c are both unnecessary, and y Traverse is
 demurrable— Ch. Pl. 635. 2 Saund 5. n. 3. Hob 104.
 2 Mod 68. 1 Lev 293. 4. 4 Ek^r 415. 1 Salk 222.
 Cro E 87. 1 Lev 241. 307.

This is only true, when y day is unnecessary^{ly} different.
 Otherwise y General Rule holds. In such a case,
 as the def cannot plead a Justification on y same
 day, y law allows him to plead a different one,
 if he alleges the Trespass to be y same—
 These rules are among the mere niceties of

pleading. The more simple and proper way is, however, to plead y General Issue as to y part not avoided, 2 Ch. Pl 579. 20. n. 7. ante 69.

Exceptions to y above 2 last Examples if y Justification (Sediment Licence) &c. is laid on y day, in wh y Trespass is alleged, to have been done, for y day is agreed on in the Pleadings. 5 Bac 206. Faltk 42. 1 Bull. 138. 2 Saund 5. a. b. 295. b. 1 Do 14.

And Thus Thus y Trespass Justified, is on y face of the Pleading. "omnia facie" identified with that complained of. and the *quæ est eadem* is unnecessary. 1 Ch Pl 535. Carth 28. Com Pl. 3. 1.

And if y Plt in y last case, relies upon a Trespass done on a different day, from y^t alleged, wh he has a right to prove, by making a "Stroel Assignment" ante 80. Bull 17. Cro C 574. 15. 165. Ray. 864. or 866. 4 Bac 125. 3 Bl 311.

So if y fact shd be, y^t a Trespass different from y one justified, was actually committed on y same day, it might be newly assigned - I conclude - Quere. an a Traverso of y *Quæ est eadem* wd not answer y purpose. 5.

Suppose the Trespass laid on a day certain, and "divers other days" - Simple. a Justification on y^t day is sufficient, and Plt may newly assign. 2 Saund 5. a. b. or 58. b. 1 JR 636.

If y day laid in the Justification, is necessarily different from y^t in y declaration (as where y date in y ~~in~~ y writ, under wh Def justifies) obliges him to vary from y day in the declaration. 2 Saund 5. a. 8. ult n. 3. 3 Lev 277. Faltk 64. Coups 161. Lutusin 1437. Yels 223. Contra 1 vent 184. 2 Keb 878. So in such. case. Def may plead, as if y

Trespas laid in y declaration & yt pleaded. were y same. as to y "qua est eadem" See vide 2 Ch Pl. 530. n. 657. 1 Do. 534. Str 69. 5 Taund. 5. n. 3. 1 Taund. 82. n. 3. 85. 298.

* Traversing before and after y day, on wh y Justification is laid, is not necessary. it seems. If y def avers. yt y acts justified are y same as those complained of. Jones. 146. *ibid*—

If not necessarily different, Def might have laid y same day. as Plt, and if he does not. y Trespas is not "bona facie" y same., and in y last case, Traverse added to y "Qua est eadem" has been held ill on Special Demurer. 2 Taund. 5. a. Str 690. being unnecessary and therefore improper—

As a Traverse well tendered on one side, obliges y opposite party to Join, where y Traverse and Inducement go to y same point. ante 88. as they almost always do. and as y Inducement in such a case. cannot itself be Traversed. of what use. in such case, it may be asked. is the Inducement. In many cases. indeed tis of no use. In such cases. a direct denial in common negative language. would be better. as being a more simple mode of bringing the Pleadings to an Issue—

An Inducement is often used in practice. when it is entirely useless. On this account. some have treated it as a mere pageantry— but it is in many case Indispensable to a good Traverse —

1st Then it is necessary many times, to prevent a Negative Pregnant, by regulating and limiting y Traverse. Lawes 118.

2^d It is necessary often, by way of Protestation ante 90.1. In other cases, where y inducement and traverse go to y same point - y former is unnecessary.

3^d Where y Inducement and Traverse go to different points, y inducement is necessary, because y Traverse alone is not an answer to y whole matter pleaded, on y opposite side - as Justification as to one day, with Traverse to all other days before and after. Here y Inducement is a necessary part of y defence. The Traverse alone is an answer to only a part of what requires an answer, ante 84.3.

So. It is a General Rule, yt an Inducement to every Traverse, must itself consist of issuable matter. 4 Bac 68. 2 Lem. 32. Cro Ch. or E 336.

For if the Inducement and Traverse go to y same point, y latter being only a conclusion from y former, cannot consist of Issuable matter. ni y Inducement does also ante 87. If they go to different points - y inducement itself is traversable - Hob 104.

and therefore y matter or subject of it must be issuable -

This Rule has been ridiculed, but ridicule was never less deserved - It is said, what is y necessity of this Rule, when y Inducement cannot be traversed? I answer, if y Inducement and Traverse go to y ^{different} ~~same~~ points, y Inducement must certainly consist of issuable matter, because it is a distinct, substantive, independent part of y defence. It therefore must be material -

When y Inducement and Traverse go to y same

point. It is impossible, y^t y Traverse shd be material and the Inducement shd not: if they are properly adapted to each other, and if they are not, y^t itself is an Informality, and therefore demurrable.

That y Inducement must necessarily be material, if y Traverse is so. where both go to y same point, will appear from the Traverse being a direct conclusion from the Inducement, and y Inducement is just as issuable as the Traverse. For if he died seised in fee. he could not die seised in Tail, and "Q converso"

In General a Traverse denies y very Terms. of y allegations, traversed. It don't however always do so: for it may sometimes amount to a "Negative pregnant." as if def. pleads a Release since y date of y writ - y Plt^f shd not traverse "not his act since y date of y writ" for y^t would imply, it might have been, at some other time. He shd plead y^t he did not give a Release, "in manner and form as alleged." ante 87.

So also, case for obstructing 3 light - Traverse y obstructing of 3 light - These Traverses are "Negative Pregnant." and it is a Rule, y^t no issue can be joined on a "Negative" or "affirmative Pregnant" 4 Bac 98. Co Litt 126. a. 303. a. 1 Root 55. 5 Bac 201. 2 Lev 197. 100. 30.

1 Str 493. 1 Saund 268. 9 2 Do 2057. Com. Pl R. 5. ante 65. La Ray. 1077. Case of affirmative pregnant in traversing "non ap^t infra sex annos - ante 66.

So if a tender pleaded at such a place, where no place is fixed by the contract, and Traverse of tender at y^e place. Here pl^{tf} sh^d have traversed thus "not his act in manner and form" "modo et forma" Lawes 116. 2 Saund 319. n 6. 2 Lev 12. 2 Mod 146. Ec.

If it is an action for money payable "on or before" such a day. Def pleads paymt before y day. Pl^{tf} sh^d reply. Not paid at y^e particular day nor after But sh^d not demur. for by such a Traverse only can y question of performance be tried. For y paymt before y day, being a performance is proper. and y time, & issue is taken upon it, cannot be treated as immaterial - and therefore under y plea of payment. on y day paymt before will not be Av - and a Traverse. "modo et forma" would put y time in issue. 2 Bac 944. 4 Burr or 2 Bac 66. 2 Mil^l 73. 2 Burr. 944

Note y difference between an obligation payable on such a day and one payable on or before such a day. 2 Bac 944. 4 Burr. In y latter case, payment before y day is a strict performance. Hence y Pl^{tf} must so traverse as to assign an absolute Breach.

In y former case. ~~he~~ may traverse y allegation, & conclude. "modo et forma" ante 65.

To y^e Rule. There is nothing analogous it is "Qui Generis" So state at large.

If an obligation or contract is made for paying on or before such a day - the Pl^{tf} must traverse in y^e Form. "yt Def did not pay on y^e day, nor before nor after - y contract is payable on or before y 25. Dec^r 1824. Def pleads payment on y 1st of Nov^r - If y Pl^{tf} should reply, yt y def

did not pay on y 1st of Nov. or before. y Traverse would be bad. The Traverse is obliged to be even stricter ym the Allegation

What is y reason of y Rule?

I answer. yt when a contract is payable, on or before such a day. it is good performance to pay on yt or any before. If y pltf then pleads. yt he did not pay on or before y day alleged, wh is y first of Nov. it is open to y Replication, yt he did pay on a subsequent day, perhaps before y 25th of Dec. perhaps on yt very day.

In y class of cases y party must traverse what is, as well as what is not alleged.

And if an obligation is payable on a day certain, Def shd not plead payment before y day (even if y fact be so) but payment on y day. 2 Mil 150. Burr. 499. 2 Burr 944 Com. Pl² 37 and proof of payment before will support y plea. (for if he was pd before y day. he was paid on y day.

But a Negative pregnant is added by verdict & by St 32. & Hen 8th. ch. 30. is ill. it is said only on "Special Demurrer" 4 Bac 98. Cro & 87. 312. 566. 2 Saund 319. n. b. Gibb C. b. 153. 1 Root 88. ante 66.

But if payment before y day. in y above case is pleaded. and found for Pltf. is not a Repleader allowed? 3 Bl 395. 1 Saund 319. b. But yt particular case depends upon particular reasons.

Burr 944. Cro & 434. This verdict would not decide y question: for tho it appears he did not pay before y day. still he might have paid on y day. 2 Mil 150.

A Traverse as usually taken, is followed by y words "modo et forma" but it seems, yt a Traverse without these words, will be good even on "Special Demurrer" tho' it is safer to retain ym - Lawes 120. Com. 12. g. 1. It is a matter of great moment, to keep clear, from making y Traverse a "Negative Pregnant" For if ^{it} includes any thing immaterial, it will be a Negative Pregnant -

Duplicity

This is a Fault in pleading - Co. Lit. 304. a. 4 Bac. 110. 3 Bl. 311. 5 Com. 36. 33. Hob. 295. Lawes 27. 107. 8. 131. 2. 152. 1 Saund. 337. B. 2 Do 101. 5.

Because it tends to unnecessary prolixity and confusion - 4 Bac. 117. 9 Plowd. 194. Yelv. 13. 1 Vent. 47. 8.

The object of Pleading, is to bring the controversy, to depend upon a single point of fact or Law and where one fact constitutes a complete answer.

Rule of the C. Law will permit nothing additional - 10 John. 400. Bac. Ab. Pleas. R. 1.

A double plea is one wh consist^d of several distinct, independent matters alleged, by y same point, (and at y same time or y same th ground of claim or defence) and requiring different answers, 5 Com. 65. Co. Lit. 303. b. 304. a. 4 Bac. 118. or rather alleged to y whole, or to one and y same part of y claim or defence. 1 Saund. 336. 7. 3 Falk. 142. 1 Do 180. As Justification and Release both pleaded, to y same Trespass, or duress and payment to y same debt or contract - either one or y other, is a complete defence. One complete defence will answer all purposes, wh any number will and therefore y Law won't allow more -

But giving different answers to different parts
of y declaration, does not constitute duplicity -
as General Issue to one part and Special
matter in avoidance to another - Traverse as
to part, and Demurrer as to Residue - Lawes 101.3.
Co Litt 304. a. 4 Bac. 118. 19. 129. ante 79

And so even at C Law. If there are Several defts.
each may plead a single matter to y whole -
or different matters to different parts of y declaration -
Esp. 414. 15. 19. 20. see 6. Mass R. 444. Lawes 132.
Hob. 70. 2 Str 140. 610. La Ray 1372.

For if A and B are joined as Defs. A cannot be
compelled to join in B's defence. and as each may
plead Separately - so each may plead separate
defences to y Separate parts - 1 Esp 47. 1 Saund 209. a.
6.

In Mass. in an action on contract, when 2 or more
are sued together, they cannot plead separately -
This Rule so unqualified, cannot be true. Thus if
2 or more choose to plead y same defence, they must
join; but if they choose different defences, unquestionably,
they must sever. A Point Indebtedness must be
proved, to oblige def to join - For independantly
of authority, the Rule, that they ^{may} must plead
separately - is undoubtedly true - See 6 Mass. 444

For if it were otherwise any honest man might
be cheated out of his property by a collusion between
Pltf and Def. so If Def is worth nothing -
he may say to Pltf. join B with me in y
suit & he must join with me in y defence.
and I will join in no plea, but y of Release.
wh being false. you will recover no no.

It is a Rule. yt every plea must be Simple entire
connected and confined to a Single point.
 ante 92 3 Bl 311.

98. But this point need not consist of a Single
fact, many connected facts may be necessary
 to constitute one complete ground of action, or
 defence. A Single point may consist of various
 facts. Suppose. Plt^d pleads. an award of arbitration
 as y cause of action, he must plead y facts
 of submission - making and delivering and all
 y particular set forth.

Again a Tender is in many cases a good defence.
 to an action on contract. But y simple fact of Tender
 is not sufficient - The def must plead y Tender
 on his side and y refusal on y other - *

There is one peculiar case. - In an action for
 Malicious prosecution, y def must not only state
 y probable cause, but every fact wh might
 possibly constitute probable cause.

The facts may be indefinitely numerous. and yet
 y plea not double. #: 1. Burr. Bac 320. 3 Bl R 1028.
 4 Bac 68. 120.1. ante 87. 3 Salk. 142. authorities
 as to y award. & Tender - (# authorities as to y
 action of Malicious prosecution - Cro E 134. 871.
 300. Ek. 533⁴ a.

The Rule is exactly y same in y analogous case
 of False Imprisonment. There are cases, where good
 grounds of Suspicion may justify an Imprisonment.
 Def may plead several causes of Suspicion -
 When y arrest ^{was} for suspicion 2 Hawk. 121. for they
 all go to one point, reasonable ground of Suspicion
 and the Replication "De Jon Tort" answers y
 whole. Indeed the Plea does not admit of
 a distinct answer. - Secus if Def relies on an

act committed by Pltff. Ekb 531. b. which, itself constitutes y point or ground of defence - as if he Justifies on y ground of a Felony committed by the Pltff. tho' he may have committed a number. he is justified in pleading but one -

Suppose a man to have committed several felonies. and to have been arrested. If he brings an action of False Imprisonment vs y officer - y def can plead in defence only one - of these Felonies - for joining another matter of defence will make y Pleading "Double" Ekb 535. 6.

So when y material fact relied upon, is y mere consequence of another fact. y latter may also be alleged. without rendering the Plea double -

As "administravit Plea" and so nothing remains in his hands. For this merely shows how, the principal fact took place. Com. pl. E. 2. Plowd 140. 1 Burr 320.

Distinct counts in one declaration, each count being itself single, an being established intended to establish one right of action or Several, do not amount to duplicity. For each count always appears on y face of the declaration - to be a distinct cause of action as when the Holder of a Bill of Exchange, sues upon it, and makes different counts of money had and received. &c. &c. They are different modes of stating y same thing - but don't constitute duplicity -

Seems if different parts of the same counts, require different answers. as where different causes of action are invested in one count to establish one, and y same right. The reason of inserting Several counts in one declaration, where there is but one cause of action, is, yt if y pltff fails in y proof

of one. he may succeed in y other, and if he prove y case laid in any one of his counts, tho he fails in the next. he shall recover proportional damages. 3 Bl 295.

But mere Surplusage never constitutes Duplicity as where there are distinct defences of wh. one is frivolous or not issuable 4 Bac 119. 1 Sid 175. 1 Rob 661. Dyer 226. 2 Wils 376. As suppose in an action on contract, y def pleads payment on a certain day, and adds. That he was always ready to pay ^{not} it before y^e the 1st is good y latter is issuable - mere Surplusage. ante 78.

1 Kell 661. 1 Sid 175.

From what has been said, it appears. y^t Duplicity in a declaration, consists in unnecessarily joining in one Count. distinct grounds of action, of different, or even similar kinds, to establish one right of Recovery - 2d Ray 404. 2 Vent 198. ante 19. 79. 1 Vent 365. Cro C. 20. Com. Pl E. 38. Abatement G. 4. action G.

So in debt on Bond, y assignment of more yⁿ one breach - in Declaration is duplicity at C Law: it is unnecessary. The pliff could attain every object by assigning one, wh he could by more. for one works a forfeiture of y whole Penalty. 4 Bac. abatement G. 4. action G. 34. 2 Vent 198. 222. Comab 297. 1 Bac 544. Com 60. 3 33. Halk 108. 1 Vent 114. 26. 1 Role 112. 2 Wils 198.

In an action on "Covenant Broken" y Plff may assign as many breaches, as he pleases at C Law. Covenant Broken. For a deed may contain a great many covenants, and any or all of them may have been broken. The action being only to recover the actual damages.

5 Com. 36. 4 Bac. 131. 1 Do 544. Cro Ch 176.
 So y^t he can recover no more damages yⁿ he
 can prove under breaches of Covenant. and he
 can prove no other breaches yⁿ those alleged,
 as in this case, y^t different Breaches are not
 alleged to y^e same point (as the breaches of
 y^e condition of a Bond, are to y^e forfeiture
 of one and y^e same Penalty) but to different
 points, i^e to several distinct grounds of damage 150.
 occasioned by the several Breaches.

But in Count in debt on Bond, y^e actual
 damage being recovered - It 27th and y^e It of Hen.
 8th and 9th Bm (1) 3^d, have introduced a
 similar Rule in England. 8 IR 120. 459.
 2 BL R. 1010. 1111. 2 Bm. 820. 2 Mil. 377. Cowp.
 359. And now in Eng. by It 4. and 5th Anne.
 y^e Def may, with leave of Ct, plead to one
 action, as many distinct defences in different
 Pleas (each being single) as he pleases.
 4 Bac 121. Com. Pl. 2. 2. Lawes 27 & Co 319.
 La Ray 1090. 3 BL 308. And we have now
 a similar It in Count. (1815) Note
 as to what several defences may be pleaded
 to one Count See aft^r 85.

The Eng It 4. and 5th Anne. comprehends no other
 yⁿ Pleas to the Declaration. Hence Def mayⁿ plead
 2 Replicatives to one Repleader, no Plt^r two
 replications to one Plea in Bar. as to a Plea
 of Infancy. Replication - necessary - provided
 after full age. (It 18. to y^e action, not Dilatory
 Pleas.

Duplicity was at C Law. ill on General Demurer.
 but by It 27. Eliz Ch. 5. advantage can be
 taken by Special Demurer. only, and the

and y Demurer must point out wherein y Pleading is ~~ill~~ Double. 4 Bac 119. 2 Do. C. 4. 1 Saund 337. Com. b. C. 2. ²² Talk 219. 678.

Ld Holt. says. a party must lay his finger on y very point "Duplex et contra Formam" is not sufficient. Lev 76. 7. Mod 71. Cro Ch. 111.

20. 1219. Ld Ray 332. Do 798. Contra 5. Com. 36. 65. Lawes 132.3. But if 2 distinct and sufficient answers. (not warranted by It) are given on one side, to what is alleged on the other. (as replying to plea in Bar, and y Pleading is not demurred to for duplicity: y other party must answer both parts, or otherwise his answer will be defective 4 Bac 119. 1 Vent 272. Thus he must traverse both. y Traverse of each must be single. R. confined to one point - as Replication - necessary - and promise after full age - ante 92 -

The Rule requiring the Demurer for duplicity to be ^{General} Special, does not apply to cases, in which y Plff joins ⁱⁿ Different Counts in one declaration, different and enigmatical causes of action, as distinct and substantive grounds of Recovery. as App^t and Trover in 2 counts. This is not duplicity, but worse. It is a Misjoinder and incurable. - 1 Talk 10.

Ray 233. 3 Lev 20. 44. 4 Bac 11. 1 T.R. 274. 8. Co. 87. Comb 232.3. As to Severall pleas in abatement being pleaded. ante 55. 6.

Profert and Ties. Lawes 96. Sid 26. It is a General Rule of Law, yt when a party ~~pleads~~ declares on or otherwise pleads a deed - and makes Title under it (R found^d his claim or defence upon it) he must aver in his declaration, &c yt he brings it into Court. 3 Pl app^t 32. Com. b. 6. O. Lawes 96.7. - as if def. pleads a Release

in Bar. he makes Title under it.

Proof is required, yet the adverse party may have Oyer. and a copy of it, and that y Court inspect it. Hob 233. Lawes 96. Com. Pl. P.

4 Bac 119 113. 6 Co 38. 10 Co 93.

The adverse party, when entitled to Oyer. is always supposed to be incapable of Pleading without it.

But if he does plead without it, he waives his right to it. 4 Bac 113. 6 Mod 283. Falk 118.

Proof is required of no other Instrument, ym a deed. It is never made in England of a Doc^e Blex^e or promissory note, for they are not the deed or Instrument on wh y action is founded. but only Evi of y promise alleged.

And the C Law makes no distinction, between a verbal contract, and one ^{not} sealed. - For by the C Law. unsealed writings create no debt. they are mere Evi of a Parol contract. Ch P. 185. Brong. 243. 9.

In practice. however, the Ct will order a copy of y writing. to be furnished ^{to} the def. before he is obliged to plead ^{to} it. He demands it. Sid 332. 1 Falk 215. In Comt the Sup Ct have disallowed y Rule requiring Proof. Quere as to its correctness.

In comt I it seems, all other unsealed writings not negotiable, containing express promise, Covenant, &c are deeds. (* Notes not negotiable, and other unsealed Instruments come under y Rule -

Lead 2. A.

Let Quere a written agreement to pay another debt, without expressing a consideration. ?

If a right acquired by deed might have passed without deed, he, who claims y right in Pleading, is not obliged to plead the deed, and, if he does not plead it, he of course is not obliged to make protest of it. - as an assignment of a Lease without deed. (at C Law) and since in pleading y assignment, y Pltff need not show it y it was by deed. (even tho y Lessee was bound, by contract not to assign without deed.

Secus if y right pleaded, will not pass, but by deed. He must then plead the deed: as he makes Title under it, must make Protest. - 4 Bac 110. 6 Co 38. a. b. 1 Buls. 119. 9. Co C. 143. Str 459. 1 Saund 9 a. n. 3 IR. 158.

But if y right will pass without deed, yet y party pleads y deed, and makes Title under it, protest must be made. - as assignment of a Lease, and a deed of assignment pleaded, and Title made under it. 4 Bac 110. E. 2. Mod. 54. Lawes 97.

Secus if one pleads, a deed, without making Title under it, as when the deed is only Inducement, to y action or defence. Here Title is not made under it. IC. it is not y ground of action or defence. It does not therefore admit of a distinct answer, of course Oyer of it is unnecessary. Hence protest of it, is also unnecessary.

As a seller B an unsound horse, and thus defraud, him. A gives B, a bill of Sale, wh is a deed -

B sues A, and brings the Bill of Sale to show how y fraud arose - he founds his fraud on the demand, and not upon the Instrument.

The deed is mere matter of Inducement, wh cannot be answered, and therefore is unnecessary 8 IR. 573. 10 Co 92. 86 Co 38. a. b.

But a Stranger to a deed, may plead it without
 protest, tho he deduces his Title from it. The
 reason is, y deed is not supposed to be made
 under his control. Plowd 149. 1 Saund. 9 a m.
 10. Co 94. 4 Bac III. 2 Show 418. 3 Lev 80. Mod 870.
 As Def pleads a deed from B. S. to A. S.
 and justifies under S. S. he need not make
 protest of it. 11es094

So Generally of any one who comes in by operation 103
 of Law. as Tenant in Dower. 4 Bac 110. Co Litt 225.
 Pente 305. 5 Co 75. As where she pleads a
 conveyance by deed to her deceased husband
 as y ground of the Title.

Exception to the last Rule in y case of Tenant
 by Curtesy. for he is supposed to be in possⁿ of
 his wife's deeds, and may retain ym during his
 own life. 4 Bac 110. Co Litt 225. a 10. Co 34.

So a Record of the same Court may be pleaded
 without protest, for a Record is not private
 property. He may possess a copy, but a Copy
 is not a Record. Bull 252. Co Litt 225. a

"A Tortion, y^t of another Court may be. Lawes 97
 Sid 529. 5 Mod 237. Bull 252. Pea 28. Co Litt
 225. a 1 Saund 9. b. 1 TR 149.

Privies to deeds must regularly make protest Privies
 of ym. in all cases. in wh y original Parties
 themselves wd be bound to do it. 4 Bac III.
 Co Litt 237. 1. 317. 10 Co 92. 4. for they are
 Records. - note as to y different kinds of
 Privies. see "Pri". An heir at Law is privy
 to his ancestor. he must therefore make protest

So of the Remainder man to y Particular Tenant.

Letters Testamentary must be pleaded with Profert,
Laws 98. See in Court practice.

Profert is not required of private It, or Letters
Patent Laws 98. Doug 446. 476

If a deed is lost or destroyed by time or accident,
it may be pleaded, and Title made under it
without Profert. for Profert here is impossible.

The fact which dispenses with Profert, must
be Specially pleaded. - So if it "in y possⁿ
of y adverse Party - The fact must be however,
stated: See 1186. 2 H Bl 243. 2 Root 482.

2 Co 7. 6. 1 Laund. 7. a. n. 3 IR 157 & Co 70. a
1 Mil 16. Pea Bri 29. 8. 10 Co 92. 3. a.

and if the Special facts are not alleged &c.
y pleading will be ill for want of Profert.

Note in such cases Relief was formerly had in
Equity, as it may be still in some instances -

3 atk 17. 1 Ber 392. 2 atk 51. 1 Smith & G 14.

Rob. 109 3 Br Chy 308. 1 Madox Ch. 24. 6.

If y facts dispense with y necessity of Profert,
and y Title is made under it, y adverse
party is entitled to Oyer. But y pleading
may be amended by striking out y Profert.

1 Laund 9. a. 1 Mil 16. B. 3. IR 153. n. 10 East 507

104.

Profert in y practice of Court is unnecessary,
for Oyer is demandable here, without it, in
all cases in wh Profert is necessary, in
Eng. 1 Root 366. 566

Formerly in Eng. omission of Profert when necessary
was matter of substance - Hutt 64. Contra

Now by St 16.17. Ch. 22 and 48. anne. it is cause
of Special Demurrer. only. 4 Bac 113. Cro B. 32.
Hob 301. Cro C 217.

The object of making Profert, is to enable y^e other
Party to crave Oyer. of the Instrument. If one
party makes profert, y^e other party is entitled
to Oyer. of the deed. 3 Bl 299. Lawes 206.
4 Bac 113. He has a right on Oyer granted,
to a Copy of it. Hob 217. 4 Bac 113.

There is one Exception to the Rule. The party
craving Oyer. is not entitled to it, even if
profert is made, provided the Party making
it, does not make Title under the Instrument.
The profert here is mere Surplusage.

Salk 497. Sid 529. 2 Mills 395. Doug. 476.7.
An case ante of a Bill of Sale, alleged
as an Inducement to an action of fraud.
but pleaded with Profert. Lawes 97.

When a deed or Bill is lost (at ante) a Copy
of it sworn to, or Ren parol Evi is admitted
to prove its contents. Ch pl. 205. 6. 10 Co 92. 3.

Salk 731. 1 alt 426. Pea Evi 29. 20. 1 Co 337.
1 Mills 344. 2 Ves Jr 812. 7. East 65. 8 Do. 273. 1 do
347.

But it must be made to appear probable
to y^e Ct, yt it is actually lost, or destroyed.

Plth oath ant admissible to prove y^e Loss.

Coleman v

Ct of Err. 1810.

The case in 2 St 1186. is a matter of practice
only.

The same Evi is admitted, when y^e deed 165.
is in y^e hands of the adverse party. But notice Cro R. 50.
must first be given to him to produce it. Pea 105.
Secus. the secondary Evi ant admissible. Ch pl.

The proport is unnecessary, yet if y deed is pleaded with it and Title made under it, oyer. & conclude, is demandable. As deed to the husband pleaded with a Proport. in a writ of Dower.

Granting oyer. when not demanded, is not Error. Adjudged the order erroneous. ed have no effect. But refusing when it ought to be granted it. for the Party craving it may have been prejudiced by the want of it. It is presumed necessary. to enable him to plead.

But y granting of oyer. when unnecessary, cannot prejudice y party. from whom, it is demanded. Lawes 99. Salk 498. 1 Sanna 90. 6 Mod 28. 2 Ray 969

To take advantage of the Error of improperly refused oyer, y party craving it, must have his prayer entered on the Record. (Secus y error would not be apparent. 6 Mod. 28.

L R or Salk 964. see Bills of Exceptions. 1 Sanna 96. Salk 498. Lawes 99. 1 Mod 28. 2 Ray 964.

This is in the nature of y Plea and y other party may counterplead, or by demurring to it. y Ct will give Judgment upon it. Salk 498 or he may file a Bill of Exceptions 1. Bac 325. Ray 485.6

On oyer granted, y party obtaining it, may enter y deed verbatim, and thus take advantage by pleading of any condition, or other part not stated by the Party pleading it - As if y condition of a Penal Bond, or any defect. illegality or variance 4 Bac 113. 2 B.C. 290. Lawes 98. 9. 0 Mod 28.

If y insufficiency or illegality &c of the Instrument, 106.
 appears upon y face of it, he may demur.
 If not. he may show it by averment. Lawer 99. 88.9
 2 Wils 340. as Moury in a Bond- *ibid*

If y deed is falsely recited. by a party
 obtaining over. y adverse party may sign Judgment.
 as for want of Plea - for y Party craving over.
 implicitly undertakes to set it out as it is -
 Lawer 100.1. and a false recital being a
 breach of this undertaking, he may consider it
 as not having pleaded, or y party procuring
 who pleaded y deed, may procure it to be
 enrolled. in his replication - (by a proper
 officer of the Court) and having thus shown
 y falsity of the Recital, may demur to it.

1 Saund 26. P. 318. 7. 1 Str 2207. or 227. 4 T R. 370.
 Carth 301. Com. pl. 1. Com. pl. b. 1.

Departure - in pleading, is the
 dereliction of a former defence or claim - for
 another distinct from it and not fortifying it -
 This is a fault in Pleading, for the Replication
 shd fortify y declaration, y Plea, and y Plea
 in Bar. This is a Cardinal fault, for it
 has already been said, yt every succeeding
 plea must fortify and support the former.

4 Bac 122.3. 3 Bac 310. Plowd 105. Co Litt 303.
 b. D. 304. a. 2 H Bl 280. La Ray 1499. 1449
 Str 422. Bnd 17.

The reason is perfectly obvious - for if when one
 party has given good answer to another, he
 is allowed to reply with a new cause - of claim
 or defence. - The pleadings would be
 endless - as one pleads in Bar a judgment.

in fee. & in his Rejoinder, varies his mode of acquiring it, or his Title, as by pleading a gift in Tail or conveyance by Lease. & release. The Rejoinder is a departure. 3 Ess. 310. *Ibid.*

So if y matter first offered is pleaded as at C Law. a subsequent Plea supporting it, by a particular custom, is a departure.

As an action on an Indenture of Apprenticeship as at C Law. 1 C. in common form not reciting any custom - Plea. Infancy - Replication - Custom of London - This is a departure - For as the custom is not stated in the declaration, y action is brot as at C Law. 4 Bac 123. 1 Lev 81. 1 Keb 376. - 469. 512.

107

So a Plea asserting a right at C Law. is not fortified by another showing a 2^d right. *Id.* 138. As Trespass for taking Beasts in common form. 1 C. not counting upon y 2^d Plea. distress'd "damage feasant" - Replication, def drove you out of y County. (wh by C Law is no wrong) This is a departure, for driving Beasts is actionable at C Law. It is by the Stat of Marlbridge. 52. Hen. 3^d 1. et 2. Phil and Mary. Action is not brot on these Statute; - 4 Bac 123. 3 Lev 48.

But if one in his declaration pleads a Stat and y other alleges, it has been repealed, y former may reply, that it has been revived - for y^e fortifies y original ground - 4 Bac 123. 1 Lev 121. 81. The action being founded on the provisions of the Stat.

In Covenant, if def pleads performance, and Plt^y replies, yt Def has not performed such an act, a rejoinder, yt he was ready to perform it, and Plt^y refused to accept performance, is a departure. 4 Bac 123. 5. Com. 99. C. Litt 304. a. 1 Sid 10.

To Plea. Infancy. Replication necessary^{ies} - Rejoinder a Release. For 442. This tho^{it wd have been} good in Bar. is a departure -

Varyingⁱⁿ an immaterial point, from what is before alleged, is not a Departure. 1 Lev 143. 10 Mod 348. "Apt 57" is a case B in apt^r declaring upon a promise made in 1814 (time is immaterial in a parol promise) Def pleads the St of Lim^t - a may reply. that the contract was made in 1824. - This variance is immaterial, for time is an immaterial circumstance in a Parol contract. Note McCom^e vs London. Ct of Com.

Apt^r on a agreement to purchase of y Plt^y stock of the Bank of y U. S. The declaration avers a tender of the stock at et c. Plea. Law of U. S. requiring all transfers to be made at y bank in Philadelphia. Replication. Tender at y Bank in Philadelphia, holds no departure. Plea. first alleged, not material.

Talk 222.3 & Bac 120. 6. Mod 110. also last authorities Balla 241.3

When y gravamen is alleged generally in y declⁿ 108. and y Def pleads an evasive answer, a more particular statement of y cause of action by way of "eternal assignment" in the replication, is no departure. Lawes 163. 2 H (BC 550. 3 BC 311. Bull 17. Lawes 164.5. 3 Mil 20. 1 Saund 28. n 2 do

5. a. B. ante 75. 80.

Plf may now assign with or without, taken Issue on the Plea. Lawes 240. 1 IR 473. 636. Story 523. 4. Form of see Str 323. 4.

Departure vitiates y Plea. it seems on General Demurrer. Semble. Tulk 221. 2 Ray 32. 94.

Str 420. 2 Cro P. 160. 288. 2 Saund 24. a. 2 Mier 96. 1 Ch. Pl. 623. Doubtful. an it should not be.

Special - 1 Ch Pl. 623. n. 1 Saund 117. Com H. 10.

But it is aided by verdict. Ray 86. 4 Bac 125

Ch. Pl 623. n. 1 Bac 117. Id 689 2 Saund 84.

This Rule presupposes, yt enough appears on y whole Record. to entitle y Party obtaining y verdict, to Judgment. (in ¹²) y matter pleaded by way of departure, is sufficient to decide y cause. - But it is not aided on General Demur

for the Demurrer does not confess y facts.

They being ill pleaded. As Plea. Infancy.

Replication. Necessity - Rejoinder. Release.

Issue upon the Rejoinder. and found for the Def. He shd have Judgment. See on Demurrer. 1 Lev 110. Kel. 566.

DEMURRER is a denial of y Legal sufficiency of the allegations demurred to - It admits such matters of fact. alleged by y adverse party as are well pleaded. & those only. Esp 636. But denies their sufficiency in Law. and refers y question of Law arising upon ym to y Court. 4 Bac 129. 3 Bl 314. 1 Saund 338. n. 3. Co Litt 71. b. Com. D. pl. G. 5. 225. Lawes 157. 9. Hob 233.

Thus it dont confess matters, wh constitute a Departures - It advances a Legal proposition

nor yet y allegations on the other side, are
insufficient in Law. to maintain y action
or defence. as y case may be.

Same

As a ^{Demurrer} ~~Transverse~~ denies matter of fact, it is said
to be in strictness, not a plea, but an Excuse.
for not Pleading. ante 4. 3 Bl app^x. 23.4.
4 Bac 129.30. 3 Mills 292.

Hence it is said, to be an irregular and collateral
part of Pleading. Lawes 42.107. But this is not
a plea in strictness, a demurrer is a good way
of answering a Plea.

Demurrer may be taken to any part of y Pleadings.
4 Bac. 129. Co Litt 72. a. 5 Mod 132. & at all
stages.

A Demurrer General or Special admits at Law.
no other fact ym such as are well pleaded.
1C rightly pleaded, both as to matter and in
point of (fact.) form. Com Pl 85.7. Lawes 167.
Hob 223. 56 1 Saund. 338.

This proposition must be taken with some Exceptions.
Note a Demurrer necessarily admits in General,
facts ill pleaded, for y purpose of the argument
and deciding upon their sufficiency as pleaded.
As a demurrer of facts well pleaded does
in Chy) tho' not for y purpose of concluding y
party demurring, as to facts to be pleaded.

But since the 4th and 5th of Anne -
It confesses. if General. all such informal
allegations as are aided under it. by those
Sts. and they aid all mere formal defects
in General. 1 Bac 94.5. Lawes 168.9. Hob. 232.83.

Com. D. 225.7. Hob 56. 1 Saund 338 Com D.P. 25.7.

Scus if y facts pleaded as matter of Estoppel,
or as a prior admission upon the Record.
Thus if in Covenant Broken, plff assigns some
breaches, well and others ill, and def. demurs.
(Generally or Specially as y case may require)
is y whole. Plff has Judgment on those only
wh are well assigned 4 Bage 131. 5 Com 138.
1 Ml 248 Holt 131. Salk 218. 2 Saund. 273. 80.
Hob 50. 223. 1 Saund 280. 1 Sid 10. Bro A 507.
Here y breaches ill assigned are not confessed.

Hence a demurer also never confesses yt which
contradicts what before appears certain on the
Record - as if one party having confessed all
allegation on the other side - afterwards alleges
what is inconsistent with it: and tho y latter
allegation is demurred, or he pleads a Record
to wh he was a Party, and thus makes an averment
inconsistent with it - 3 Lev 124. Cro C. 35. Lawes 108.
Here y matter alleged is not ^{well} pleaded, for y
averment is inadmissible in y one case, as
being as a prior confession - and in y other, on
y ground of Estoppel - In both cases, it is opposed
to what is before made certain -

So an averment of what is impossible -
1 Sid 10. Com. D. 56. D. J. 6. 5. Lawes 108.

It never admits facts avowed, wh, it appears
on the Record, are incapable of being legally
proved - The averment of such facts, is itself
a good cause of demurer. As Case of Estoppel
Intra. 1 Sid 10. Lawes 45.

Again it does not admit allegations, wh are impertinent,
or wh are not material or traversable, ante 77. 91.
5 Com. D 139. Lawes 108. Salk 551. 4 Bac. 131.

For what he cannot traverse, he does not admit by not traversing - But if a material fact is well pleaded, a demurer will confess it.

tho it could not have been distinctly traversed. As considerations in "aft" As a "Scienter" in certain case ante 21.

So of facts in themselves immaterial - but made material and traversable by being precisely pleaded. ante 7. 92.

It never admits y truth of immaterial or impertinent averments. 5 Com 138. 4 Bac 131. Falt 551.

It never admits conclusions of Law made by y adverse party from facts stated. Hob 58. 4 Bac 131.

It admits matter of fact only - as "prout ei bene licuit" in a plea of Justification is not confessed by demurer. So in "Undeb. aft" if y fact alleged do not raise a promise in Law. Demurer does not confess y promise - The Ct must conclude what is Law.

After an issue in fact joined, (wh is done by adding the Similitur) there can be no demurer. an issue joined closes all y pleaded. ^{ind} All allegation in any form is thus precluded - 1 Thow ²¹³ 313.

Co and Bl call a demurer, an issue in Law. 11. 3 Bl 314. 5 Co Lit 71. 2. n. not strictly correct.

Formerly tendering an issue and concluding to y country, did not preclude a Demurer. on y other side - ante 85. So an Issue in fact for an issue is not closed till Ponder - It is substantially a Traverse. of y adverse party's major proposition in the syllogistic form of pleading 4 Bac 54. Lawes 43. Co Lit 126.

If there is a Demurrer, and an Issue in fact, in y same case. (as there may be on different parts of y declaration) Plea. Je. y demurrer is to be regularly tried to be ~~not~~ tried. For in this way. The Jury may assess all damages, at once, wh they could not do, if y issue in fact were first tried, & both issues found for Pitt.

Still it is in the discretion of y Court to try either first - 4 Bac. 130. 5 Com 136. Co Litt 72. a. 120.
5. Palmor.

If in y last case, Judgment is for Pitt, on the demurrer, he may, if he pleases enter "Not Prof" as to y issue in fact. I have his damages assessed on the part demurred to only. As General Treacher assigned in "Covenant Broken" some demurred to, some traversed 4 Bac 130. 5 Com 136. Salk 219. Str 574.

112. There cannot be a Demurrer to a Demurrer. It works a discontinuance, except (say La Holt) where a demurrer to a Plea in abatement, is not opposit - 4 Bac 121. or 130. Salk. 219. Comb 306. Lawes 172.
There y demurrer itself may be demurred to - Com C. 300. This is Hebrew to me. There does an inapposite demurrer, mean one praying Judgment in Chief & vide Lawes 172. Contra Salk. 219. 2 N R. 453. For Example. - How can it ever be proper?

In all other cases, I trust, at any rate, y adverse party must join - Com 306. post 11.
For as an Issue in Law reaches back through y whole Record, it cannot be immaterial - If however La Holt's Exception is correct.

it is confessed y only one -

If Def demurs to y declaration, and concludes
in Abatement, Plt may join in Bar. and
have Judgment in chief, if y declaration is
good, for the declaration is confessed - Lawes 72.3.
3 Lev. 223.

113.

Demurers are of 2 kinds - 1st General 2^d
Special - 4 Bac 132. 5 Com. 138. Co Litt 72. Lawes 167.
A demurer not assigning specially any particular
cause, is ~~gen~~ general -

One pointing out specially y particular cause
or defect, on wh it is founded, is Special -
4 Bac 132. Co Litt 72.

The latter, Mr Lawes remarks, were introduced
by St 27. Eliz C5 L. 5. Lawes 167.8.

They are rather made necessary by that St
in certain cases, in wh General Demurer were
proper at C Law post 114. 1 Linn 337. Hoo 232.
1 Vent 240. 4 Bac 132. For Special demurers,
were in use before that St.

To constitute a Special Demurer, y cause of
y Demurer, must not only be assigned, but
set forth Specially - Assigning Cause. (if it
is assigned Generally) does not make y demurer
Special - A cause may be assigned in such
General Demur. as to make it General -

As that the declaration "is uncertain & want
form" this leaves y Demurer General - 4 Bac 132.
1 Will 217. 9. 1 Show 242. Comb 287. La Ray 788.
ante 112.

Again Duplicity must be pointed out Specially -
If a Party demurs to the Plea of y opposite party

as being double or Informal. his demurrer is not Special. But if he points out Specially, in what of duplicity consists, then it is so.

Formerly demurrers in Eng were always Special. 1 Bac 132. 1 Vent 240. and Co says, it is a good Rule, to make ym Special in all cases. 2 Buls. 265.

It is doubtless a safer mode, when there can be a doubt. an y pleading demurred to, is faulty or not in substance.

A Special demurrer reaches all defects, wh a General Demurrer does, and many others wh a General Demurrer does not.

114. It is a Rule, yt all Substantial defects, i.e. y omission of such things^{as} are material to y right of action or defence, are reached as well by General as by Special Demurrer. But by St 27. Eliz and 4. and 5th Anne formal defects are reached by Special demurrer only. (except in dilatory Pleas, to these the St does not descend, for dilatory Pleas are odious to the Law.) Note the St 4. and 5. Anne. and all defects in General Demurrer. If sufficient matter appears in y Pleadings, upon wh the Ct can give Judgment. see 1 Bac 94. 5. La Ray 1010. 337. Tulk 194. 2 Sid 885. 3 YR 186. 1 Ch Pl. 456. 2 Do 679. 82. 4 Bac 132. 3 10 Co 88. Lach 185. Co Litz 72. Str 624. Hob. 127. 164. Hutt 115. 5 Mod 18. 1 Tulk. 291. 2 Bac. 315. Lawes 167. 8. Com Pl. 208. 10 Q. 5. 6

The Rule does not extend to Dilatory Pleas.

A Demurrer to a Plea in abatement need never be Special. The St of Eliz and Ann. do not require it. The object of the St was to prevent captious Exceptions. The St 27. Eliz introduces y

Rule of demurring Specially, for such defects in General. That of 4 and 5th Anne, after enacting the same General provision, extends y Rule to certain particular defects expressly named in it—

The St 27. of Eliz extends not to appeals. Indictments, presentments, or actions on Penal St. 1 Ch 642. Com PC 27.

But the St 4th Geo 2^d Ch 26. extends y Rule to actions on Penal Bonds. St. 1 Ch PC 642.

It has been observed, yt in all Pleadings, 2 things are necessary. 1st That y matter pleaded be satis- 2^d That it be alleged according to Form of Law. Co Litt 303.4. Bac 2, Hob. 164.

The want of either these requisites, is good cause of demurrer. If the pleading is deficient in matter or substance, a General Demurrer is proper.

If in form, a Special Demurrer is necessary, in case of Dilatory Pleas— ante 114. Hob 232.

4 Bac 2. 137. 7 Mod 71. 2 Ld Ray 798. do 882. u 802

The omission of yt without wh. y very right does not appear, is a defect in form only. Ibid.

Ex of a defect in substance. If does not in his declaration aver performance of a condition precedent when such averment is necessary, or omits to aver "Science" in def. In cases, in wh science is of y gist of y action— or consideration in dft or Conversion in Trover— 4 Bac. 2. 119. 134. ante 6. 53. See. of "verme" mere Error in form—

Ex of a defect in "form"— Duplicity. want of "verme" in Transitory actions &c.

When there is therefore a total want of substance,
(as if one who one another in slander for calling
him a Jew) or where a material allegation is
omitted (as if Piff in Grover who not states
property or in Trespas, possⁿ) a General
or Special Demurrer would reach y defect.
3 Bl 334. 94 Hob 133. 138. 232. 301. Co Litt 12. a.
1 Sid 184. Earth 389. 138.

If a Party pleads any thing, wh from y face of
the case, he appears to be stopped from Pleading.
it till on General Demurrer. (R. I conclude
if, the allegations demurred to are material)
for y only objection is not to y form of y document
but to the averment to the fact in any form.
Lance 10. 170. 38. 128. 140. 1. b. 155. Hill 13. or y other
other party may reply to the Special matter
of Stopper Specially.

116. A Special demurrer reaches no other formal
defects, y such as are Specially assigned, for cause
of Demurrer. As to all defects, not thus assigned,
it is but ~ General Demurrer. 4 Bac 132. 10 Co 88.
The General Rule is on Demurrer to declaration,
if Judgment is given for Def, no similar or
Concurrent action can afterwards be sustained
for y same cause, or on y same grounds,
as were disclosed in y first declaration.
2 Bl R 827. 6 Co 7. Cro. C 668. Pea 30.
1 Ch. 180. 1 Mod 207. For a final Judgment
deciding y right in Question, must determine
y controversy - or litigation would be endless.
1 Ch. Pl. 190. o. 1 Mod. 225. see "Evid"

Since if y first action were mis-carried - as
Trespas where Grover was y proper action - for here

y 2 actions are not concurrent. The right claimed
in y second could not be decided in y first—
Aliter also. if Plff failed in y first action
for want of an ~~ess~~ essential allegation, wh
is supposed in the Second. (Pea 37. 2 Vent 106.
2 Saund 41. 7a. 4 Bac 110. 6 Mod 20. 14. ~~re~~ 610.
1 Ch Pl 190. 6. 660. 7. Cro E 30. Hunt 81. 3 Mil 240.
304. 9. Esp. 100. 2 Bl 799.

And the Plff is bound by a former Judgment as
above tho he failed in the first action on the General
Issue. or a Special Plea in Bar. For it suffices
yt y right in Question has been decided between
y Parties, whatever was the form of the Issue.
6 Co 7. a. Cro E 008.

But a Judgment ~~on~~ Plff in one Real action,
is not a Bar to another of a higher nature
to try his higher right to the subject. 4 Bac 110.
6 Co 7. see y Rule explained 3^d Inst 353. 60.

For y actions are not Similar nor Concurrent.
nor is y right y same.

This Rule cannot obtain in Count, for we
have but one Real action ~~or~~ Disservin—
Indeed yt in strictness, is rather a mixed action.
tho called Real. for damages are recovered,
tho but for Trespass.

But tho a declaration be insufficient tho a
mistake in Pleadings. yt if Def takes no advantage
of it, but pleads a Special Plea, upon wh y Plff
takes Issue. and y right is found for y def.
Plff shall have no other action for y same cause.
y merits having been tried, and y right decided.
4 Bac 110. It 120. 6 Mod 207. As to an
insufficient declaration. y Def pleads a Release.

and it is found for him.

But nothing in it so fraudulently ~~as~~ recommends²
 It is no Bar to an action in Ct on a contract
 obtained by Recommendation - As the causes of action
 are different - 3 Ch. 1208. Pea 172. Pea 2 124.
 But in But 67.

Demurer shd extend to y whole declaration pleade
 in a part of it is otherwise answered - and shd
 be Coextensive with y part not otherwise answered.
 If not, tis a Discontinuance. ~~by~~ Lawer 1712. Com. Pl.
 21. ante 1780. n. As to a discontinuance by
 answering only a part of what is alleged.
 on y other side - Lawer 135. 6. 161. 2. 6. 1 Millig 481.

A Demurer reaches back thro y whole Record,
 and attaches on the first substantial defect in
 y Pleadings Post 1323. Com Pl 28. Salk 578
 1 Linn 288. n. Com. d. P. 2.]

I say. "Substantial defect" because if a formal
 defect is passed over, it is a waiver.

But the Ct must give Judgment upon the
 whole Record, even tho y Parties join in Demurer
 upon the single point, or particular part of y
 Pleadings - Ex Dec^t insufficient, Plea in bar,
 and replication - both good - Demurer to y
 Replication

Here y only question in the Demurer is, an
 y Replication is good. But this ant y only
 question for y Judge to decide - He must
 look back to y declaration, and say if it is
 good. - If he finds a substantial defect there
 Judgment must go vs the Plff. 1 Ch. 647.

Hob 56. 193 250 5 Co 52. 2 on 320. 9 Co 110. 4
 Bac 1317. La Ray 1080. Salk 408 640.
 8 Co 120. 133. 6. 3 Lev 244. 2 Vent 79.

As to mode of entering Judgment in such a case.
see Arrest of Judgment (1 Pound 280. n.) Com 92.
E 3. 2 Mil. 100. or 101. But there is an Exception
to this Rule in Debt on Bond - for performance
of Covenants on an award -

If def pleads an insufficient Plea, and Plt in
his replication assigns no sufficient Breach -
y Def shall in Demurrer have Judgment.

Tho y declaration is by itself good, and y plea:
for in these cases, y true cause of action does not
appear till y Replication is given - 3 Co 52.

8 Do 120. b. Palm. 287. 2 Bul. 94. Cro J. 133. 221.

La Ray 1080.

The Replication is in such case, a sort of Supplement
to the declaration, disclosing y particular grounds,
on wh y Penalty is claimed - So that y Replication
is in y order of Pleadings subsequent to y Plea,
yet in effect, it is a part of the declaration, & hence
y defect in the Replication is in y order of Title
prior to yt in the Plea.

So if one Plea in Bar Bar. wh goes to y whole
declaration, is demurred to, and adjudged sufficient -
(tho Def plead Several Pleas in Bar) Judgment
will be for Def, even tho y Issues upon another
Plea be found for the Plt. 1 Pound 80. 2 Burr.
789. 749.

For there is one sufficient defence, and it
appears from the Record, yt the Plt might
be barred.

Form of Demurrer in Count, "yt y declaration
and matters therein contained, are insufficient
in Law. and theroff. he prays Judgment -

Verdict. That declaration &c matter be sufficient.
 &c and heroff. be wages Judgments, not necessary tho'
 usual in England. to conclude the demurrer. with
 a verification. Lives 172. Leon 24. 5 Mod 132.
 & the Eng Arm. sees 3 235 11th 23. 4 Bac 100.
Lives 243. 4.

In civil cases, Judgment upon Demurrer follows.
 of nature of the Pleading demurred to - Hence Judgment
 upon Demurrer. "except upon Dilatory Pleas")
 is peremptory. 12. final. 4 Bac 132. Ponke 300.
Dyer 63. 341. Cr. E. 195. 11600

If therefore demurrer is to any Plea in chief,
 & Judgment is in chief, either yt & Plt recover
 or yt Def go "omni die" It is a Final Judgment.

So in criminal cases, that of Felony. 4 Bac 132.
Pro C 100. 2 Hawk. 334. 1 Co 60. 1 Roll 12. 80.

So that def is not allowed to plead over, when
 his demurrer is overruled, except where & offence
 charged amounts to Felony. The Law allows an
 Exception in "parson's writ"

In prosecuting for Felony or any capital offence.
 a better opinion is, yt the prisoner may plead over
 after his demurrer is overruled. Contra 2 Hale
 Hale or Holt or Black. 257 243. 4 Bac 334, 8.
 2 Hawk. 334. Pro C 106. he may still plead
 to y action.

If a demurrer to a Plea in abatement is
 overruled, the Judgment is not in chief. of
 course, but y award of the Ct is a "Respondent's
Writ"

Of Demurer to Evidence.

311.

119.

On some cases, where the Pleadings terminate in an issue in fact, one party may take y Examination of y cause from the Jury to the Ct. by demurer to, or upon the Evi, wch y adverse party exhibits in support of the Issue. 4 Bac 106. Co Litt 72. Allen 18. La Ray. 404. Bull 313.

This, tho' called a demurer to Evi, is essentially a demurer to y fact shown in the Evi, and in y respect is distinguished from a common Demurer, wch is regularly taken to the Pleadings.

Demurer to Evi is taken before y party demurring, exhibits any Evi on his side. Semble. 1 Root 370. For if y Testimony in both sides were taken, a demurer would necessarily refer y comparative weight of Evi to the Court. a Question, wch belongs to the Jury, and not to y Ct.

A Demurer to Evi must be taken to y whole Evi, exhibited in support of the Issue, and can be taken to the Evi of y^t party only, who takes y "Onus probandi".

Thus under y General Issue, y defi Evi cannot be demurred to. If a part of the Evi ed be demurred to, a part only would be presented to the Court, and the Court therefore ed not decide upon the validity of y whole.

It is to be observed, y^t Relevancy of Evi is matter of Law, to be decided by the Court. Its relevancy being established, y question, how far, it conduces to prove the Issue or fact to be ascertained, is a matter of fact to be determined by the Jury.

2 H Bl 200. Doug 380. The Ct. to use Mr E.
 Sherman's language. is "functus officio"

As the Ct can never weigh the Evi, but only
 determine its relevancy, it can never be proper
 to demur to Evi, wh is clearly relevant to y
 whole Issue. It can never be proper to demur
 to Evi, wh is clearly relevant to the whole Issue,
 however weak it may be. and Evi is always
 relevant to an Issue when it conduces in any
 way to prove it, 2 H Bl 205.

Is not material, as the Jury believe or ^{under} come of it,
 is not. The demurer puts an end to the question
 of fact, and refers to the Ct, y application of the
 Law to the facts shown in Evi, ~~by the adverse~~
~~party~~ to. 120. It therefore admits y facts shown
 in Evi by the adverse party, and like the
 Demurer, denies their legal operation in his favour.
 E. then sufficiency in Law to support y issue.
 4 Bac 130. Co Litt 72. 2 H Bl 200.0.

In y nature of y thing therefore y fact must be
 first ascertained, till yt is done y question of Law
 cannot arise on the Demurer. 2 H Bl 200.0.
 Hence y necessity of the admission ^{after p^a} heretofore mentioned
 wh y party demurring to the Evi, is bound to
 make in some cases, upon the Record, for a
 legal proposition cannot be predicated without some
fact.

There has been much controversy with regard to
 y circumstances, under wh a party is bound
 to join in Demurer.

When y issue is inserted in support of the Cause,
 is written. There was never any doubt, yet it might

be demurred to: and y Party exhibiting it, must
 join in the demurrer, or waive the Err, for by the
 writing, the Err is made certain so there cannot be
 a variance. If he withdraws his Err, he withdraws
 y whole of it. - as when a deed is exhibited as Err
 of a Title, or Covenant, or as Err of a debt. 4 Bac 136.
 5 Co 10. 510. 104. a. Cro C 757. 2. (not Law) 2 Litt 72. a.
 3 Bl 372. 1 Root 570. Bull 313. R. 100.

There are other modes of taking advantage of Inaccuracy.
 The party vs whom y Err is brought, may file a
 Bill of Exceptions &c. The Demurrer, however, is y best
 way. It brings the matter to y "Summum Res"

As a brings a debt on Bond as B. but brings
 it upon it, before the debt becomes due, now the
 Def may file a bill of Exceptions, and take
 other modes. but y most unexceptionable mode,
 is to demur.

It appears, on the face of y declⁿ, yt y debt is
 not due.

How far a party is bound to join in a Demurrer
 to Parol Err, is a question very recently settled.
 There is a confusion on this point in the older
 authorities & Bac 136. 1 Lev 187. Co Litt 72. a.

5 Co 104. according to Cro C. 757. 2. he is not
 bound to join at all, because the Err is uncertain.

But y Rule in y extent is not Law, and is
 clearly settled as well in the old as y new authorities -
 or cases.

Ist That tho' all y Err rests in Parol, both
 parties may agree to join in a demurrer to it.
 Cro C 752. for he who joins, of course waives
 any Inaccuracy, in the Demurrer.

II It is now settled, & if one of the Parties, produces witnesses to prove any definitive fact, & adverse party may by admitting & fact itself in Record, oblige the other to join (in the demurres) to ~~take~~ it, or to waive the Err. do suppose in an action of Trover. by Bailor vs Bailee, & Plaintiff produce witnesses to prove neglect. Now Def may admit this very fact of neglect and safely demur. for neglect does not amount to conversion. Allen 18. 2 H Bl 200.

III And it seems now. to be also settled, & if a Parol Err exhibited in support of this Issue, is certain, i.e. direct and explicit, no contradictory from indeterminate, and circumstantial.

The adverse party & by confessing it in the Record to be true, may compel & Party producing it, to join a demurmer to it, or to waive it.

2 H Bl 216. Suppose the question to be, an a certain fact did or did not take place. If a witness declare. "I saw such an act done." "I know & fact to be thus" his Err is certain.

But if he testifies to a collateral fact, which renders the other probable. his Err is circumstantial.

By confessing indeterminate Err, he does not confess the fact. for the Err is not direct and therefore.

-IV- If the Err introduced, is loose and indeterminate, & adverse party cannot demur to it, without admitting it to be certain and determinate as well as true. But by making such an admission upon the Record, he may demur to it, as it is written or Parol, and then & Party producing it, must join or waive & Err 5 Co. 104. 2 H Bl 207.

But he is not bound without such admissions
 Bull. 313. For without it, y fact testified about
 is not ascertained: even admitting the Evi to be
 true: but the question of fact wd be referred to
 y fact Court. (†) Formerly admitting y Evi to be
 true, is admitting only that a witness believed y 122.
 fact to be true and thus, and thus the Evi
 wh y fact conduces to prove is left unascertained

As the witness says "I believe y fact to be so"
 or "according to my best recollection it is so"
 In this case the Party demurring, shd state y
Evi as being certain and determinate, i.e. as if it
 were positive and unqualified, as well as true.
 Otherwise the weight of Evi wd be referred to
 y Court. (†)

V. If the Evi produced, is circumstantial, y
 party demurring to it, must distinctly admit
 upon the Record, every fact and every conclusion
 in favour of the opposite party, wh it conduces
 to prove. I.e. every thing claimed from it.
 wh the Jury might infer from it, he may
 then demur to it, tho it is Parol.

Quia it is not competent for him to demur.
 and of course the adverse party is not obliged
 to join the demurrer. Doug. ¹¹⁴104. 127. 9.
 2 H Bl. 207. 9. Allen 18. Bull ²¹⁰313. For 22. 34. & title

For by circumstantial Evi, is meant Evi of some
 distinct collateral fact. from wh, y principal
 fact may be inferred

But the truth of such Evi may always exist
 with the possible non existence of the principal fact.

and the evidence to prove every point, so that it is relevant. As if circumstances are given in the case of the acceptor of a Bill of Exchange, to raise a presumption, yet he knew the Payee to be fictitious: he must admit in his demure, to the Verdict, that he knew, and not merely that the Verdict is true, otherwise a weight of Verdict would be referred to the Ct., for a matter of fact would not be ascertained, since the Verdict might also be true, consistently with deep ignorance of a fact.

Of the point party demurring does not in a 2d case make a admission, as the Rules require, and the adverse party joins in a Demurer, so can give no Judgment. For the demurer would refer the truth and weight, as well as the relevance of the Verdict to the Court.

In such cases a "venue de novo" must therefore be awarded. Rule 33. & Rule 10. 2 H. 20.

123. The Exch. Court in 1787. decided, that in a Demure to a Part Verdict, before a single magistrate, a party opposing it, was not obliged to join, because a Demurer in such case would tend to entangle a proceedings. Kirby 352. Where how can such a reason be allowed to control or affect a Question of Law?

The same Ct. decided in 1788. that a Party opposing the Verdict, was not obliged to join in Demurer to it, tho' it was chiefly written, and all agreed to. 2 Inst 307. Not Law

The point in issue on a Demurer to a Verdict is, as the Verdict demurred to, is sufficient in Law.

to maintain y Issue in fact. Hence on such Demurer
no advantage can be taken of such defects
in the Pleadings. Post 126. But advantage
may be afterwards taken of such defects, by motion
in Arrest of Judgment. as after verdict[#] and so ^{# Long}
after General Verdict. & conclude y Issue being ^{208.} Bull 213.
considered as proved, and y facts demurred to as
Evidence, not being recurred to, under y motion,
in Arrest of Judgment. ante 69.

The Party. whose Evi is demurred to, may always
demand the Judgment. of y Ct. as he ought to
do. For if there is no colourable cause of ~~action~~
Demurer. y Ct will not allow it. for justice
shd not be delayed on frivolous pretences.
4 Bac 136. Bull 314. Allen 18. 2 Rolle 117. 2 H Bl.
205. 8.

On Demurer to Evi, and Finder, y usual course
is, to discharge the Jury immediately, and y first
of Enquiry is executed afterwards, tho sometimes
y Jury assess y damages provisionally, before y Demurer
is determined. Bull 314. Cro El 148. 2d Ray 50.
Proud 410. Talk 287. Long 212. 2 H Bl 205.

In Court there is no writ of Enquiry, damages
are assessed on Demurer to Evi by the Ct. if
decided for Pitt. If any particular part of y Evi
in support of the Issue, being objected to, is admitted
by the Judge, y party objecting cannot demur
for yt cause. and to that part of y Evidence
alone. for the demurer must go to y whole
Evidence, given in support of the Issue. 125.

The proper remedy is a Bill of Exceptions, or
motion for a new Trial. Bull 314. Talk 284.
see "Writs of Error" 1 Root 370. 2 Swift 208.

If a Party offering to demur to Evi, is overruled by the Court, his Remedy is by Bill of Exceptions - 4 Bac 136. 1 Do 336. 3. Co 13. b. 1. 331. Crok C 249 & 341. Cro E 341. or 8. The whole proceeding on a Demur to Evi (as by entering it on Record, admitting it to be true &c) is under the discretion of the Ct. 2 H Bl. 209. 8. and the Ct may prevent it, if y matter appears in Law. clear. ante 12. or 120. & Ibid

2 H Bl 200. Mode of Demurring to Evidence

The party demurring, states it on the Record, makes the necessary admissions, alleges, yet it is not sufficient in Law. to maintain the Issue, and concludes by praying Judgment, et for want of sufficient matter in that behalf, the Jurz, may be discharged from giving Judgment or verdict and also if taken by Def. that the Plff may be barred. See Rule 314. 2 Lev. 200.

Note. This proceeding of Demur to Evidence, was not very common among Lawyers, formerly, from y danger of committing themselves to admissions, necessary to support a Demur. But since y very important case, 2 H Bl 200²⁰⁰ y difficulties are in a great measure removed, and it is quite frequently used.

Arrest of Judgment and Repleader

To arrest Judgment, is to stop or stay it. This is done in motion - reduced to writing and entered on Record.

This proceeding is usually had, only after an Issue in fact tried, and verdict found, 3 Bl 380. 381.

But this is not universally y case, for it may be after a default (Plt may be true and yet not sufficient in Law) 2 Burr 505. or after a demurrer. to Plt determined - Doug. 208. 13. 2 Str 1271. ante 23. The principle on wh Judgment is arrested, is, yt as the Judgment of y Law Court is a conclusion of Law. and as it must be given on the whole Record, he, who does not upon the whole Record, appear entitled to it, cannot have it, even tho the verdict has been found. or default suffered, or a demurrer determined in his favour.

The Issue raised by motion, is an Issue in Law. Vanance Post 193.

Judgment is arrested for intrinsic causes only, i.e. such as appear on y face of the Record. as when the declaration varies totally from y Mit- one being in Debt - y other in case. 3 Bl 393.

So when y verdict varies materially from y Issue. For in such cases. the verdict not being found either way, it is improper to render Judgment upon it. The facts in question are not ascertained, Ex Stander. for y words. "he is a Bankrupt." verdict finding the words. "he will be Bankrupt" 3 Bl 393.

So if y declaration is wholly insufficient, as if it declares no cause of action, Plt cannot have Judgment, tho he may have obtained a verdict - 3 Bl 127. 303. 5. The verdict cannot contain or disclose facts not alleged. If therefore y declaration contain no cause of action, the verdict cannot make one. 127.

And on the other hand. if y Defi plea. on wh he

has obtained verdict, discloses no Legal defence to the action (y dectⁿ being good) Judgment may be arrested by Plt^f - 3 Bl 390. Cro E 778 For y verdict only verifies y facts alleged in the Plea in Bar. but these facts do not constitute a good defence for the Plea and verdict deny nothing asserted in the declaration.

Defect in So ascertain what defects in the Pleadings, will Pleading support a motion in arrest of Judgment after verdict, the General Rule is that after General verdict the Judgment may be arrested for any cause, wh might be assigned after verdict and Judgment for Error.

In other words, if Judgment in pursuance of the verdict wd be erroneous, it may be arrested. 5 Com 174. 2 Benc 716. 30. 740. Salk 77.

To determine what defects will and what will not make a Judgment afterwards erroneous, y General Rule is the following - Of the statement only of the Plt^f or def^s title, or cause of action is defective, it is aided by a General verdict Hence a Judgment given in pursuance of the verdict wd not be erroneous. As dectⁿ in Trespass. wd not lay a day certain. Thi, tho ill at C^l Law on General Demurrer, is aided by verdict. 3 Bl 391. Doug 508. Pious 232. Salk 300. o'Bea 37. Sta 1123. Cro E 377. East 388. Cro E 311. 428. Contra Cro E 38. Sid 8.

IF

Is it not now aided on General Demurrer? 1 Lev 124. 1 Sanna 118. 285. Pilt C. b. 132. Post 139.

IF

But, no title or cause of action, or a defective one is stated, it is not aided by verdict, for

here a Judgment in pursuance of y verdict would be erroneous. - as a grant of an Incorporeal right by Parol alleged. case for calling Plff a Jew. 3 Bl 394. Doug. 658. Not alleging post in Trespass. 1 Sid 184. or notice in an action vs an Indorser. or conversion in Trover. or non performance of a condition precedent.

The case in Doug. Rushton vs Aspinwall. contains y best exposition of this doctrine. viz. yt if Plff in an action of Trespass mistakes y day in the Statement of y cause of action, y verdict will aid y defect. But if y cause of action is defective, nothing will cure it.

The same distinction applies "Mutandis Mutatis" to y defence pleaded by the def. as in y case of "not guilty" pleaded to debt or ass't vs an Est on a promise by Testator. Def pleads. yt he did not promise. - Salk 365. Bull 320. 3 Burr 1728. 7 GR 578. Carth 369. 3 Bl. 395. Cro E 778. 1 LR 145. Cro E 437. 497. 4 GR 472. Salk 130. (here Plff may arrest the Judgment.

Again it is an invariable Rule, yt any defect in the Pleading, wh will support a motion in arrest of Judgment, must be such. as wd have been fatal on General Demurrer. 3 Bl 393. 4. Post 139. 40.

Thus in an action for Slander, y Plff alleges. yt Def called him a "Jew" and def denies it. Now if the Jury establish the fact by verdict, y Def may move in arrest of Judgment, yt y words are not actionable - But this Rule don't hold e "converso"

That whatever wd support a General demurrer,

will support a motion in arrest of Judgment.
For if y declaration De omits some particular fact
or circumstance, without proving wh, y party
obtaining y verdict, ought not to recover, but
wh is implied from those facts (or rather
from the finding of those facts.) wh are alleged
and found. The omission is aided by verdict.
tho it wd have been fatal on General Demurrer.

As y omission is aided by verdict, it will not
support a motion for arrest of Judgment

As omitting to state value (revenue) in Trespass.

So omission to lay a day, wh at C Law is ill
on General Demurrer. Ek 497. 5 Bac 195 59.6.

3 Bl 394. ³⁸⁹ Carth 398. Cro J. 44.

For y Jury in ascertaining y damages (in y 1st Co.)
are supposed to have found the value. So of a grant
of an Advowson, or Release pleaded, without alleging
it by deed. Hunt 54. 5 Bac 317. 3 Mills 376. 10 Mod 381.
ante 11. post 130. The verdict thus supplies y fact
omitted in the Pleadings, or corrects y mistake.

3 Bl 394 For the Ct presumes the verdict to
be founded upon a deed, since they could have
no other Legal Evi-

A Def pleads in his Rejoinder, what wd be a
a departure, now if Plt demurs, he will have
Judgment, for a departure is bad Pleading.
But if the Plt takes issue, and a verdict
is found for the def. y Judgment can be
arrested.

It becomes necessary now to determine what
defects the verdict does thus supply. Rule is.
That after a General verdict, y Ct must presume,
at all facts not alleged, wh are necessarily implied,
from those (or rather from y finding of those) wh are

alleged & found, were proved to a Jury on the Trial -
1 Saund 28 228 n 1.

In other words. The Ct. must presume, in support
of the verdict, every thing, wh in point of fact is
necessary to warrant the finding - Doug. 658. 1 SR 140.
Carth 389. Bull 320. 1. 1 Saund 228 n 1. 2 do 1/4 C.
1028. 2. 1 Mil 172. Cowp 827 n 287

In other words. every thing, wh it was necessary
to prove in proving the Cause. Bull N.P. 321.
Doug. 658. 2 Root 273. 4 Bac 86. m. Ray. 487.
and then the verdict by necessary intendment
implies y fact omitted in the Pleadings. For the Ct
not to presume this, wd be in effect to impeach
y verdict. This is y governing principle, 1 Saund 228.
3 Bl 394. 1 Mod 292.

Thus when in Trespass, y Pltff omits to lay a day
certain, y Ct after a verdict for Pltff, will
presume. That the Trespass. was presumed to have
been committed before the Suit brot. and yt
y declaration is aided, tho ill at C Law. on
General Demurrer. 10 212. 3 Bl 394. 389
Carth 130. 389. Salk 662. 130. 5 Mod 237. 5 Bac
317. 7. SR 578.

For some particular time must have been proved,
and proof of Trespass after suit brot wd have
been inadmissible. So if he lays a future day.
Carth 389. Note wd not the declaration now be
aided now on General Demurrer? 1 Saund 118.
103. 286. 1 Le 124. Gill C. 10 132. ante 127.
So holden. 3 Feb 354

Thus the verdict aids y declaration, tho it wd
have been ill on Demurrer. So if y value
of y thing is omitted in Trespass 20 407. 4 Burr

2455. 5 Bac 136. 57. 60.

It would seem. yt y doctrine of curing y defect, in y Pleadings is not arbitrary -

Bull observes. yt if a party alleges a Feofment. wtht alleging Livery of Seisin, y verdict cures y defect. This can't be correct. for there is no fault. The remark was probably made. thro' inadvertence - For it is a necessary part of every feofment. and, thus it is said, y declⁿ is aided by verdict. 1 PR 145. 5 Bac 317. 10 Mod 301. Hutt 54.

But quere. an it was in y first instance necessary. to allege Livery. Co Litt 303. b.

For the Pleading. it wd seem. wd be good wtht it. "ante 6" even on Special Demurer: for a Feofment "Ex vi termini" implies a Livery of Seisin - Cro E 401. Com PL. C. 3. Lawes 48. Co Litt 303. b. Cro E. 411. 4 Bac 100. So of a grant of Reversion wtht alleging Attornment - Lawes 48. 8 Co 82. b

So of a Grant of advowson is pleaded wtht Averment, yt it was by deed. and found by verdict. The Ct will presume. yt a Grant by deed. was proved. as there can be no grant of y kind wtht one. 5 Bac 317. Hutt 54. 2 Hil, 376 10 Mod 307. ante 12. 128.

Thus y verdict is said to ascertain these facts. wh. from the inaccuracy of other y Pleadings. did not appear before. 3 Bl 304. 1 Mod 202. On y other hand. nothing can be presumed. from the verdict (ie. presumed to have been proved) except those facts. wh are and found, and such as are necessarily implied from y finding of ym. 1 PR. 145.

Hence if y Title or cause of action itself appears defective (ut ante 129) is where there is a total want of substance, y defect cannot be aided.

Doug. 658. 3 Burr 1728. 3 BL 394. An action for calling a Plt a Jew. Here there is no fact to be presumed, wh ed make y words "actionable".

So if any fact is omitted, wh is essential to y cause of action & wh is not inferable from the finding of these facts, wh are stated and found, y fault is not cured, for y fact omitted cannot be presumed to have been presumed, proved to the Jury.

3 BL 395. 1 SR 145. Talk 305. Of course, y verdict cannot by any Intendment sub,ly it be of an Aft or Covenant Broken, performance of condition precedent is not averred, y dec^r is not aided.

So if in Aft vs an Answer, notice of y defenor of the Bill is not alleged. Doug 654.

For the facts don't follow from those alleged.

not necessary to be proved to the Jury, to warrant ym in finding those, wh are alleged. 4 Bac. 16.

7 Co 162. 5 Com. 45. 1 SR. 645. 8 Do. 129. 8. 7 Do 125.

2 H BL 574. 2 Burr 905. 4 SR. 472. 2 Root 97.

132.

But the Ct cannot presume (18 on principle cannot) wh is omitted, because in point of Law merely it is necessary to warrant a Recovery, for such presumption can't be raised, but on the supposition y^t the Jury are competent Judges of the Law.

But upon this supposition, every defect wd be cured by verdict, and indeed it wd be preposterous even to make a Question after verdict, as to y sufficiency of the Pleadings.

Thus in apt if no consideration is alleged.
and Plt^y obtaining a verdict, y omission is not cured.
1 Vent 27 7 IR 357. (Kilby 430. Contra. strange
decision and opposite to all authority) For y fact
yt a promise was made, does not imply a
consideration, and y consideration is essential in Law.
to y validity of a Promise, it is still not implied
in y fact. yt a promise was made, not necessary
to warrant the finding-

Motion in arrest of Judgment after a default
operates exactly like a General Demurrer.

Nothing is cured (by a default) except what
would have been on General Demurrer: for
nothing can be presumed to have been proved,
there being no finding at all. 2 Bac 900.

Str 1271. 1 Mil 171. 2 Burr 900

So after Special verdict, nothing presumed.
for all y facts found. are specially found.
and appear on the Record.

In some cases, however, Judgment will not be
arrested for y greatest default, and even tho'
nothing is cured by the verdict ante 8. 24. 118.2
Hob. 56. 119. 4 Bac 131. 2 La Ray. 1080. 1. 8 Co. 120. 133

This happens, where the first Radical fault
in y Pleading, is on the side of the Party, who
moves an arrest.

For there being a Radical fault, he cd not be
entitled to Judgment, at any rate and the
Judgment must be given on y whole Record.

Thus if y verdict is in favour of y Party, who
upon the whole Record, ante 130. appears
entitled to Judgment, he shall have Judgment.
however faulty on his part, may be y practice

particular Pleading, on which the Issue is taken,
is declaration wholly insufficient - Plea in Bar
frivolous, and Issue on the Plea found for y def.

Pltf cannot arrest the Judgment, for y first
radical defect is on his side, and a Trivious Plea
is sufficient answer to such a declaration -

To if y declaration is good. Plea in Bar and
Replication both Trivious. Issue taken on the Replⁿ
and found for Pltf. he shall have Judgment. -
The Replication is sufficient for the Plea in Bar
Hob 50. 3 Co 110. 3 Lev 244. Hob 199. 4 B & C 131.

And on y other hand. when Judgment in pursuance
of a verdict, is arrested, Judgment in Chief as y party
for whom the verdict is found, may sometimes be
rendered.

This is more yⁿ an arrest of Judgment. The Rule is,
yt if y party vs whom the Issue is found, appears
upon y whole Record, entitled to Judgment, it must
be rendered in his favour, y verdict to y contrary
notwithstanding - Ibid and 1 Burr. 357. 5. 6. Br Pl
57. 577. 1 Ch Pl 634. This is called a ^{Judgment} verdicto non
obstante -

As declaration wholly insufficient - Plea in Bar
sufficient or Insufficient. Issue on the Plea found
for Pltf. Judgment in pursuance of the verdict. will
be arrested and Judgment entered for Def.

It wd be to no purpose. to award a Repl^{eder}ication.
Repleader. yt cd not help the declarⁿ, nor cd
any Issue. yt cd be taken on a Plea in Bar.
and y the declar. 1 Ch Pl 634. Hob 50. 199.
200. 8 Co 120. 133. 1 Burr 301. 6.

But Judgment is never thus rendered, in
in very clear cases. - If the case is not such.

a Repleader may be awarded. Post 136. Br P.C.
577.

Suppose y declaration good, and y Plea in Bar
frivolous, and Issue taken on the Plea in Bar,
and found for the Def. Here y Pltff may arrest
y Judgmt. and claim me in his favour.

Defect in the Issue.

But if Issue is taken on an immaterial point,
(when material facts might have been traversed)
so yt y finding does not in Law. decide y right
Judgment must be arrested, and a Repleader
awarded. 2 Saund 314. a. m. o. Carth 371. Cro P. 434.
585. 1 Saund 228. n. 1. Talk. 569. La Ray 922.

Bac Pl 93. o Mod. 1. ante 65. 92. 1 Ch Pl 632. 4
4. Com Pl. R. 18. 2 Saund. 319. C. u. n. 6

As where y Traverse leaving what is material,
puts in Issue a point. yt is not so. as if in
apt vs Cat. he pleads. that he made no such
promise 2 Vent 196. 3 Bl 395. ante 9. 2. 6.

Action vs husband and wife for a wrong done
by her. while Sol. Plea. that they are "not Guilty"
and verdict for the ~~verda~~ def. Repleader
awarded. Lawes 176. 4 Bac 127. Cro P. 5.

R

Or a point not traversable, as matter of Law.
For in such cases. the Issue, on wh y verdict
is found, being immaterial, y Ct can't regularly
discover from the Record, for whom Judgmt
ought to be rendered.

Note can the Ct even discover y from an
immaterial Issue. in (as y case may be)
when it is immaterial only from being a Negative

Pregnant"? ante 66. 92. I G. thinks not.

Hence the Judgment being arrested, a Repleader must be awarded. As on a contract to pay "in or before 3c. Payment before y day is pleaded. precisely traversed and found for the Plt 3 Burr a Bac 249. Str 994. ante 92. b. 66. Post 148. "neg Preg"

Again

135 Declaration good. Plea in Bar good. Plt traverses an immaterial issue part and obtains verdict. Judgment must be arrested, and a Repleader awarded. yt Plt may take issue on a material part of the Plea for y verdict decides nothing-

Note. Does not the Plt admit what he does not traverse? If he does, is it not clear upon the whole Record, in the last case, yt the Def is entitled to Judgment? see Coup 582.4. I conclude, y issue in such case is supposed to be taken by mere mistake, wh the Rule of practice allows to be rectified by a Repleader, see 137.) Cro E 240. Lawes 175.6. 4 Bac 126. Ray 458. La Ray 704. 67. 1 Burr 301. 5. 3 BB 395. 1 Vent 196. Str 994. Cro B. 5. 2 Saund 319.

Secus if y Plea in bar had been wholly insufficient and Plt had traversed a part of it, or y whole, and had obtained a verdict. Plt has Judgment for it appears from the whole Record, yt no manner of joining Issue, cd have availed y Plt Def, or have formed a better Issue. - And a Repleader is never awarded for any defect wh cannot be cured by any manner of joining Issue. 1 Burr 301. 5 Com B. 6. 8 Co 120. d. Hob. 58. 199. 200. 2 Lev 204. Str 304. 4 Bac 218. a -

Same Rule holds, and for y same reason, for any other Pleading, wh is radically ill, & upon wh. issue is taken, and a verdict found for y party traversing, unless there is a plain substantial defect in y other side, and the Result wd have been y same. if y verdict was for y def.

Thus suppose as before, a Plea in Bar insufficient and Pltf takes issue upon it, and Def has a verdict upon it. Indgmt in pursuance of y verdict is arrested and Pltf has Indgmt, for he appears upon the whole Record, entitled to it. 4 Bac 131. 316. Denk. 102. 11 Co 10. 5 Bac 286. Dyer 362. Salk 173. La Ray 234.

2. Summa 319. Repleader when Awarded.

On a Repleader awarded, y Pleadings begin anew, and (regularly) at y^t stage, in wh y first deviation from the Rule of Pleading occurred, (or rather at y first fault, wh occasioned y immateriality -)

As Plea in Bar, sufficient - Pltf traverses an immaterial part, and has a verdict. On a Repleader awarded, Pltf is to take a new Traverse, or make some other answer to the Plea in Bar. Cowp 570. 4 Bac 126. Salk 579. vide 2 East 110 d 2. 3 Bl 395. Salk 579. 173. 210. 1 Burr 301. 6. 2 Summa 319. Ray? 456. La Ray, 169. 3 Keb. 664. authorities, y^t if y Declar and Plea are both ill, y parties may begin "de novo" #

La Scott says, y^t if an Issue is taken on an immaterial point, and there is a prior fault, y repleading is to commence with y

with y first fault - I G could never understand
y^o.

*Quere How can y^s be, except by a new Suit.
or an amendment allowed on motion? Neither
of wh can be properly called a Repleader.

Do not y meaning, yt the Judgment of a Repleader,
being general. "That y Parties replead "quod
partes expolacient"?

If a Repleader is awarded for a fault in y Issue,
each party may avail himself of y Generality of y
Issue Judgment, to correct his own Pleading-
even back to the declaration (so semble)

But if the declaration is not radically ill. there
shd be no Repleader - Def ought to have Judgment
ante 133.4. The Rule now regards defects in
stating y Title or defence, not such as shown
to the Ct, yt no mode of stating it. now prevails
6 Ch Pl. 634. Com. Pl R. 18.

Repleader for y immateriality of y issue is never
awarded in favour of y Party, wh tendered y Issue.
(semble) It is his fault. Judgment goes vs him.
if the Issue is vs him. When the verdict is vs
him (y Pleading of y other Party being good) does
it not always appear from the whole Record,
of course, yt y latter is justly entitled to y Judgment?
I think it does. his material allegation being
confessed. - Post 140. 60. 92. 134. Doug. 380. 1 Saund 308.
1 H Pl. 644. Corp 501. 2 Saund 319. Tid 824.

The same thing, it appears, is true, when y verdict
is vs the opposite Party - But as he has joined
in the Issue, on the true Issue, he can't
have Judgment rendered vs the verdict -
only a Repleader. see 130.

If y person tendering the Immaterial Issue,

is so fortunate, as to obtain a verdict, he may replead on an arrest of Judgment by y opposite party.

An Issue may be immaterial, if found one way, and if found another do debt on bond payable on or before such a day - payment before y day is pleaded. - precisely traversed. and found vs Def. Repleader must be awarded - Secus, if found for y def for y finding wd show. that he was entitled to Judgment.

The reason, why the Issue for the Plt^y is not aided as a "Reg. Preg" by verdict, seems to be, y^t Plt^y traversing (as above) does not show an absolute Breach. ante 26. 66. 2 Burr 944. 4 Bac 66 2 Mil 443 Com BP 148.

So of "molliter manus impositit" - If found for def. it may be decisive. Secus if for Plt^y. But this is only a "Reg. Preg" aided by verdict ante 66. 92. 96.

Generally, a Repleader is never awarded after Demurer - only after an Issue in fact, for in y former cases, y parties have already put themselves upon the Judgment of y Ct. Suppose. def demand to y declⁿ. and y demurer is supported, y Ct can in y case. give Judgment in chief. 6 Mod 102. 3 Lev. 440. 20. Contra Not Law. (Semble) 4 Bac 120. 5 Co 52. 10oph. 42. 4 Ch. Pl. 634. 2 Summ 310. 2 Lev. 12. Lach 148.

The better reason is, y^t y question of Law. arising by Demurer. cannot be immaterial or indecisive. ante 114.

When a Ct has a demurer adjudged, a plea

to be insufficient, y Party may amend by the permission of the Ct. in the payment of costs. If a repleader is awarded, where it ought to be denied, or *vice versa* it is subject to a writ of Error. 1 Ch Pl. 633. 4 Bac 126. Salk 579. 6 Mod 2. 1 Day 27. 152. Gleason and Callen v Chester Ct of Error 1803.

There can be no Repleader after a default or discontinuance. 1 Ch. Pl. 633. 4 Bac 126. Salk 579. 6 Mod. 2. 8 Comb. 323. In y first place. Pltff does not wish to replead, and the def has not pleaded, or he has abandoned his Plea. In y second, y Party discontinuing, is out of the Ct. In neither case, is there any issue on wh the Judgment of y Ct is required.

At C Law. Repleaders were sometimes awarded before Trial. Not so in General, since y St of Jeofails, if y issue may be cured by verdict or by St of Jeofails. But if y defect is already incurable, it may be done, before Trial. Term Carth 371. 4 Lev 19. Skin 570. Salk 579. 1 Ch Pl. 133. 4 Bac. 56. 126. 9. 1 Bac 90. 103. 3 Keb. 664. 6 Mod. 2. 1 Lev. 32.

Repleader is never awarded upon a Writ of Error. 4 Bac. 127. 127. 2 Tanna 312. 2 Lev. 12. 6 Mod. 102. Tho it was done in the ancient practice. Note It has been allowed in Comnt. Bac. vs Curtis. Sub Ct. See Form. of Repleader. Lintw 622.

Defects in the Verdict

Motion in arrest of Judgment might be sustained either for defect in y allegations or in y Issue, or

in y verdict. As suppose y Jury find only part
of y Issue, omitting something material. 5 Bac 296.
Cro E 103. 3 Lev 82. Hard 66. 2d Ray. 1521. Str 844.
1089. Co Litt 227. Eib 421. In such cases, y Ct will
award a "venire de novo" but not a Repleader,
the fault, not being in the Issue, or Pleadings,
but in the verdict.

So if in a Special verdict, y Jury find only Part
of a material fact, and not y fact itself - either
way. There must be a "venire de novo" 1 East 111.
2 Burr 1243. Eib 590. As demand and Refusal,
found in Trover. 10 Co 55.7. without any fact
amounting to a Conversion or disposing of it.

But if y substance of the Issue is found, it is
sufficient. Co Litt 227. 1 Vent 27. 12 Mod. ante 126.

If y verdict varies from the substance of y issue,
it is ill and Judgment is regularly arrested -
as Jury find something foreign to y Issue,
instead of the Issue. 5 Bac 299. 2 Rolle 707.
49. 719. 18. 2 Vent 57. a "venire de novo" is awarded.

But a verdict, wh finds the Issue, is not
vitiated by finding more. It is Surplusage.
"utile per inutile" &c as Issue, an Def has assets.
verdict, finds, that he has assets beyond Sea.
5 Bac 297. 9. 2 Rolle 714. 5 Co 407. 6 Co 57. Cro 9407.

If the Jury assess greater damages, ym the Plt's
demands, he may release the Surplus, and take
Judgment for the Residue. 10 Co 115. 5 Bac 195.
272. 2 Do 223. 4 Bac 25. 2 Buls. 280. 2 YR 113.
123. 1 LC Bl. 643. Eib 304. Str 367.

Or y Ct to prevent Error, may without Release,
give Judgment for the Residue only. 4 Bac 25. 2 Lillies 585.

If y^e P^lt^f demands more, y^e n^o by his own showing
is due, and y^e Jury find more, he may remit
y^e excess, and take Judgment for y^e rest. 4 Bae 20.
Holt 780. Co 150. Allen 129. 5 Bae 130. 272.
Ch 334. 2 R. 113.

If the Jury after finding a fact specially, make
a conclusion of their own, y^e Ct is not bound by
such conclusion, but will give Judgment on y^e
facts found, without regarding the conclusion—
5 Bae 230. 1 Co 10. Dyer 262. Hob 33.0. or 330.

As on questions of T^esin, y^e Jury find some particular
fact, and conclude, and thus "C^t was misled" etc.

If in a Civil case, there are 2 counts, one good
and y^e other ill, and the Jury find a General
verdict, and entire damages. Judgment is arrested *
and a Verdict de novo awarded" 2 H Bae 318. 2
Bae 7. 1 Root 340. 433. Co 1094. Co B 318. 780. 2 Wil 377.

For it is not known to the Ct, upon what count
y^e damages were assessed, or how much on each.
10 Co 130. Bull 8. Ch. 528. 302. 1 B. 333 329. 331.

Yet in this case, y^e declaration need be good, on
Demurrer. (ante 22) for that is sufficient, there
being one sufficient one. Count. It is y^e assessment
of entire damages wh^{ch} prevents y^e P^lt^f from having
Judgment. 3 Bae 508. 1 Mod 271. Not any fault
in the Pleadings ante 129. Count Ct has lately
decided contra Quere Ibid.

140. Secus if several damages are assessed on the
several counts. P^lt^f may thus release those assessed
on the bad counts, and take Judgment for
y^e other. Id Ray. 13.

Note When severing damages vs several defs
is a ground for arresting damages. see 2 Bac 8.
Esp. D. 321. 537. 11 Co 67. Carth 19. 5 Burr 2790.

Where is a Release is necessary? Where the Judgment
is bad. a "venue de novo" is awarded. 8 D. R. 164. Doug 362.

But tho' entire damages are assessed. yet if no
Veri was given on the bad count, y verdict
may be corrected by the Ct above. from the
Judge's notes. so as to apply y ^{judge's to the} good count only.
Doug 362. Str 513. 10. And thus an arrest of
Judgment may be prevented - Lev 134.

In criminal prosecutions, if one count is good.
and y other bad, and a general verdict vs
Def. Judgment is not arrested. For y Ct decides
y punishment and will give Judgment vs Def.
on the good count only. 2 Burr 280. 2 Hawk 627.
Salk 384. Doug 703. La Ray. 888.

In Court. Judgment is arrested for many Extrinsic
causes. i.e. not appearing in the Pleadings or verdict.
and not appearing ~~in~~ originally in the ~~vero~~ Record.
but bro't upon the Record, under y motion in
arrest of Judgment. itself - as corruption in the
Jury Siry 13. 133. 184. 166. as asking y opinions of 3d
persons. finding upon the case of a die - &c see
"New Trial."

So of misbehaviour of Party to y Jury. as tampering
&c. 3 Bac. 291. Str 642. Co Litt 227. 1 Vent 125.

So if one of the Jurors. was interested in the
Suit. or so relates to y prevailing Party, or
his Bail - as to found a principle Challenge.
Siry 184. 279. 61. 87. 142. 273. 7.

That a Juror has before been an arbitrator in y cause, or atty, or has given opinion in it, is a satis ground for arresting Judgment.

General Rule. Incompetency of a Juror, if it goes to his impartiality, wd be a good cause for a principal Challenge, is in Count. a ground for arresting Judgment.

142.

But any incompetency, wh raises no ground, or presumption of Partiality, is not sufficient cause of arresting Judgment. Rich 184. Str 299. as want of Freehold in a Juror. Note ruled contra - In capital misdemeanors. The same Rule holds, as in civil cases. (Sensible)

And even tho y incompetency does go to y impartial. of the Juror. still if y Party, vs whom y verdict is, knew y fact in season, for making Challenge, and omitted to do it, he is considered as having waived the Exception - Exception, and cannot take advantage of it. by a motion in Arrest of Judgment. 2 Lev 232. Rich 166. Ruled contra in a capital case in Count Sub Co 1815.

Hence if one of y Jurors has before tried y cause in a Ct Below. y Party vs whom y verdict is, cannot arrest the Judgment, for he is presumed to have known the fact. since it appears upon y Record. 2 Lev 232. Rich 166.

A previous opinion disclosed by a Juror. upon a general principle of Law. involved in the Issue, is no cause of arresting Judgment, or even of Challenge. Rich 426.

So if a previous opinion on the merits of y case, appears clearly not to have influenced y verdict,

As a Juror having expressed an opinion several years before, but declaring on an Oath, yt he had forgotten it - Kirby 62. 2 Lev 232.

The Ct on motion in arrest of Judgment, can never 143.
go into y Ori on wh y verdict was found Kirby 61.
162. 273. 2 Lev 264.

Said by Swift on an arrest of Judgment for misbehaviour of y Jury or Parties, a Repleader is awarded. 2 Swift 264. not Law. 1 Root 573.
There is only a *venue de novo*.

In Eng, as in Court, verdicts are set aside, and Judgmts arrested, for certain causes not appearing in the Pleadings, or verdict or not appearing originally on the Record Record. 5 Bac 288. 31. 2. 2 Lev. 200. Str 642. Bumb 31. As misbehaviour of the Jurors, Jurors, or Parties.

But in Eng. y fact is entered on the "Postea" by a Judge. who takes y verdict at N P. so as to become part of y Record, and the Judgmt is arrested in Bank.

Difference between y mode of prosecuting and ours. In the latter, yt Ct. wh arrests. inquires into y facts: for our Ct all set in Bank. No Nisi Prius Cases.

The same thing has been done in Eng. in two cases, upon Affidavit. 5 Bac 291. 1 Freeman 73. John 80. But a new Trial is y usual remedy in such cases. 5 Bac. 250. John 80.

In Court such Petition facts are alleged in y motion and found by the Ct. in wh y motion is made. and the same Ct decides both upon y truth and sufficiency of y motion, and y Ori exhibited. So yt y only difference in this proceeding,

between y Eng and Count practice, is. yt in Eng.
yt y Judge at A P. finds y facts and puts ym on
Record, as the foundations of y subsequent motion
in Bank. and that here. y motion is made before
y Ct. in wh. the Issue was tried, and y facts
are ascertained on a subsequent hearing of y motion
in y same Ct and being found. y Indgmt is
then arrested.

In arrest of Indgmt for defects in y Pleadings—
no costs ^{are} were regularly allowed, on either side.
for the Party arresting Indgmt might have
demurred, and prevented the existence of a Trial.
Str 617. 1 Ch Pl. 633. 1 Root 59. 70. 572. Kirby 89.
2 Bent 196. 1 PR. 267. 1 Ch Pl. 638. 9. Coups 407. Helo 79.

144.

So if y motion in arrest of Indgmt is overruled,
and y Party moving, brings Err. and prevails,
he does not recover y costs below 1 Ch. Pl. 638. 9.
and for y same reason—

This Rule does not apply to arrest of Indgmt in
Count: for extrinsic causes. There is a second Trial.
or "a venire de novo" and regularly y whole
costs will follow the final event of the Suit.
Root 467. 1 Root 572. 117

In Count. where an Issue in fact. is closed.
to the Ct. there cd be according to former practice
no motion in arrest of Indgmt. For y Ct judged
of y pleadings under the Issue, and on finding
y Issue, immediately gave Indgment. 2 Str 264.
now decided by the Ct of Error. yt exception
to the Pleadings cannot be taken under an
Issue in fact: tho' closed to the Ct. That y
Issue must first be found by itself, and
afterwards there may be a motion in arrest

of Judgment, ante 124. leaving the issue and deciding in y first instance on the Pleadings in Err. Nichols. vs. Parnell. Ct of Err. June. 1811.

In England. motions in arrest of Judgment are made within y 4th days. of y next Term - after Trial. 3 Bl 395.

In Court. y motion is made on the verdict being accepted and must be reduced to writing, and delivered to the adverse party, or lodged with y Clerk within 48. hours. exclusive of Sundays.

Note Is it not 48. hours now? see 3 Day 28. afterwards exclusive of the Sabbath. and always before y end of the Term. Kirby 238. 1 Root 572.

Form of motion in arrest. &c. see 3 Bl App^e 11. Reference to page. 66. 92. 96. 134. 137.

Fini
min

Bills of Exceptions

A Bill of Exceptions is a statement of facts. (of and some interlocutory Judgment. decision or direction in point of Law. founded upon ym^{it}) annexed to the Record. for y purpose of having (laying) a foundation for a writ of Err. 3 Bl 372. 1 Bac. 325. 4 Bull 136. 9 Co 13/3.6.

This statement consists of facts not originally appearing on the Record: but. wh. are y foundation of some Interlocutory Judgment, and wh. y party vs whom it operates, supposes to be erroneous. and is called a Bill of Exceptions because it contains Exceptions to the Interlocutory Judgment.

This mode of finding Error. was unknown at C Law
It was introduced into Eng. By St of Westminster. 2^d.
13. Edw. 1. C 31. of wh St it is a creature, 2 Inst 426.
9 Co. 13. b. ~~Rel~~ 324. Bull 310. 1 Bac 320. 3 Ch
372. 30. 10. 172.

In Court no St on y^e subject, but the Ct have
adopted the Eng St as one of those old St considered
as forming a part of the C Law Kirby 108.

This St is also probably adopted either by the Ct of
Justice or by some Legislative act in most of y^e States
in N. L.

4 The object of a Bill of Exceptions, being to found
a writ of Error. it follows, yt it cannot be filed
or taken, in any Ct. from wh a writ of Error lies,
do not in Ct not of Record in Ength or Ct of
Probate. or Ct of commissions in Court. Bull 316.
1 Bac 327. Post 16.

This Bill may be taken in all Ct, whose Indgmts
are liable to be reviewed. by writ of Error. as
in Eng. in Common Pleas. Kings Bench - Exchequer.
&c. but not in Chy it being a Ct of ~~Record~~^{Error}.
and it has been doubted by some, in ^{Error} it might
be filed in the Kings Bench. in Bench. Eng.
The proceeding being "coram Rege" But I conceive,
according to principle, it may be filed as well
in yt Ct as in any Com Pleas. 1 Bac 36. (358
of "Kinner" 2 Lev 287. 2 Show. h. C. 147. 287. Role 316.

In the later, it may be taken from all those Ct.
from wh Error Kirby 289. 2 John 117.

In Court. May may be taken in Sup County. or
Justice Ct - Some doubts as to the Justice Ct.
Why? Kirby 289. no reason for it - it is a Ct of

Record - overruling an offer to demur to Evi (properly made) is an Error. for wh a Bill of Exception may be filed -
 Cro. 249. 341. 1 Bac 326. 4 Do. 136. 9 Co 13. b.

Also a misdirection to the Jury by the Judge, in point of Law, in Eng. is a good foundation for y^s Bill. tho' much more commonly remedied by a motion for a "new Trial" both here and in Eng. in modern practice. 1 B et P. 364. 5. 2 H Bl. 288. 2 N P. 1.

So if Evi objected to, is admitted or rejected - a Bill of Exceptions may be taken, and filed by y^e party vs whom y^e decision operates - It is also a ground for a new Trial. and as the admission or rejection is a point of Law. it may be by order of a Bill of Exceptions or of a new Trial - But y^e more convenient and now more usual mode now is, to move for a "New Trial" 1 Bac 326. 2 Lev 237. 276. Kirby 168. Bull. 316.

But if y^e Judge admits y^e parties Evi, bill is not allowed. because he did not direct y^e Jury. * How to find upon it. even if y^e Evi of it were a Record (wh is always conclusive) and he didn't tell y^e Jury, yt it was so. or took no notice of it. 1 Bac 326. Bull 316. Ray. 405. (* it is mere neglect. and not Error.

So if Oyer is refused, when in y^e opinion of y^e Party, it ought to be ordered. But in this case, advantage is usually taken of the Refusal, by entering y^e Prayer of Oyer. on the Record - as a kind of Plea - "Pleadings 105" or ordered, when it ought to be denied - a bill of Exceptions may be filed. The latter clause of y^e Rule appears incorrect - as in Pleas. "Pleadings 105"

To in y case of allowing, or overruling challenges
 is Error. 1 Bac 320 2 Duv. 422. Dyer 231. Day 486.
 For this also is a point of Law. and if correct (in error)
 may be objected to -

But on an interlocutory Judgment, relating to mere
 practice, y Bill of Exceptions cannot be taken -
 the continuance for a cause, compelling a party to plead,
 ordering or refusing to order security for costs. &c.
 (ut Sup.)

To when the decision of any kind is discretionary
 with the Ct. as in y case last put. Granting new
 trials (Hilly 41. Hall 316. Post 290. 1 Bac 327.
 Imposing Terms. of granting ym. &c. If there
 Error is not predicible. and so a Bill of Exceptions
 is imposed -

For in these cases. there is no principle of Law,
 involved, the violation of wh is essential to y ground
 of Error. - They are therefore matters altogether
 discretionary with the Court.

Suppose a new Trial granted in a case, in wh
 or by a Ct. where it is not by Law. grantable,
 (in any case or under any circumstances) will not
 Error lie? as By Justice of the Peace. Post 27. 47.
 I G. thinks it not and therefore. a Bill of
 Exceptions will lie.

And as a General Rule, a bill of Exceptions cannot
 be allowed to any decision of a Ct. y it is entirely
 discretionary. for of such Judgment. Error is not
 predicible. Hence a Bill does not lie, for not
 granting a new Trial, for this is an application
 to the discretion of y Court. If a new Trial.
 however shd be granted in a case in wh. or
 by a Ct. in wh. from y very nature of it, is not

grantable.

Error wd be predicible of such a decision. As if a new Trial shd be granted in a criminal case, after deft acquitted, or if a Justice of y Peace shd grant a new Trial. Thus the determination of y Ct must be entirely discretionary: i.e. such y^t y Rules of Law. wd justify in determining either way.

In prosecutions for Misdemeanors, as y def. if acquitted, cannot be tried again, there wd seem to be no use in the prosecutor filing a Bill of Exception. But as the def. if convicted, may be entitled to another Trial in many cases: may be not in such cases. file his Bill of Exceptions. Post 75. Misdemeanor

Bills of Exceptions are not allowed in prosecutions for Treason & felony. For the Judges. it is said, are counsel for y Prisoners, and must see, y^t Justice is done y^m. (an Extraordinary reason. since y^s Bill is always founded on the Error of y Ct. or y supposed Error.

A Second reason is, that the C Law from its beginning beg benignity towards criminals. will not allow. a man to be tried. twice for y same offence. - True reason. St of Westm^r authorizing su. Bills of Exceptions, don't extend to such cases, and of course. give the Ct. no authority. to grant a new Trial. Note There cannot be a second Trial and this is y reason. why they were omitted in the St. it seems. 1 Sid 84. 1 Lev 60^g

Ray 486. Keeling 10. 1 Bac. 320. 1 Keb 324. 2 W. 825

1 Mo Nally 325

It is now the practice of our Ct. to grant new Trials in favour of the Prisoner: and if

this be Law. I can see no reason, why a Bill of Exceptions might not be filed in his favour. That it cannot be filed vs him, I shall observe more particularly on the subject of new Trials.

7. Whether allowed in Indictments for offences in se capita
 Quere: Ray. 486. 1 Sid 80. 1 Bac 325. 2 Hawk 92.
 248. 1 Leon 5. 1 Vent 366. Bull 316. 1 Lev 86. Keeling
 13. Killy 269. 1 Mc Hally 3267. Inall b 201.

It has already been allowed in Eng. on Indictment for Treason - 1 Bac 325. 1 Leon 5.

From the last Rule. I conclude, it is allowed, but not vs the Prisoner in favour of the Prosecutor, for if acquitted, he cannot be tried again - It lies in favour of the Prisoner.

Regularly, when the Bill of Exceptions is filed, y Ct will not suffer y Party filing it, to make y same Exception, y ground of a motion in arrest of Judgment. 18. will not suffer y Party to move in arrest of Judgment, on the point, on wh y Bill was allowed, having given their opinions, y

Party's remedy is then a Writ of Error. This Rule is sometimes dispensed with in B R. Bull 3167. 1 Bac. 327. 1 Vent 366. 2 Lev 237.

Note. By a motion in arrest of Judgment on y same point, must be meant - a motion founded on the Bill of Exceptions 18. on the point brot on the Record by the Bill.

Confined to Special points

The object of the bill being to draw before a higher Ct. a Judgment on some collateral point - it is regularly allowed not to embrace y general merits of y cause. I.E. to draw y whole controversy into a future examination.

A Bill. therefore made out after Judgment and containing a general statement of y facts and arguments, is inadmissible, tho' sometimes y experiment is tried - In Court. if the Ct below allow it. y Ct above will abate y writ of Error. Kirby 339 456. 77. Corp 161. 1 Bl R. 555. Bull 216. 2 IR. 549. 2 Str 276. Is not y proper course on motion to quash it? 1 Mangin Essays. 466. 8.

The bill is authenticated in Eng. by the signature of the Judge, or by one Judge, who appears in y Ct above, and acknowledges his Seal. - ... How Certified.
1 Bac 325. 5 1 Br et P. 32. Corp. 161. n. Kirby 466.

In Court, it becomes parcel of y Record. in the Ct below, and is exemplified with y rest of the Record.

In this state, it is in y common practice, to state not only the Interlocutory Judgment and the simple fact, but also y ground of y Exceptions, and wh were taken at y trial -

But in Eng. it need only contain a statement of the Interlocutory Judgment, or direction of y facts on wh it is founded. - If y facts are truly stated, y Judges are bound to certify I.E. to sign it.

Otherwise not, and if they refuse to sign - a Mandamus issues by the Ct of Westm^r 2^d to 2 Feb 72) order them to sign 1 Bac 325. 6. Bull 316. Corp 161.

2 Lev 237. Show n. c. 116. Where does this writ lie in Count.?

It was formerly certified by the chief Justice or presiding Justice - Now there is usually a motion made for a new Trial by a Rule of the Sup Ct., y propriety of wh is questionable - Where had they y power? C. C. thinks not

9

When to be Tended.

In Eng. the Bill itself, or at least y substance of it, reduced to writing, must be tendered at y Trial. Bull 310. Tulk 288. Holt 307.

In Count. a party must give notice of his intention to file a Bill, 1 Root 596. or move to file a Bill. when his Cause of Exceptions accrues, and the Bill must be filed within 24 hours. after y verdict, after it is recorded, in y case of Trial by Jury, and within y same time after Judgment, when tried by the Ct. (excluding Sundays.) and always before y rising of the Ct. 2 Lev. 276 1 Root 569. 70.

10.

A Bill of Exceptions is not itself a Supersedeas of the Judgment below, but merely enables y party to obtain a Supersedeas. by allowance of a writ of Error. 1 Bac 327. 12 Mod 637.

Form of. For the form of a Bill of Exceptions. see Bull. 317.

In Count. y form is. County Bill of Exceptions A vs B. Action of De. Plea. &c. On the trial of said cause. Pltff &c offered in Ev &c and Def. objected &c. (stating y grounds.) Ct decided

in favour of Plt. and now y def excepts &c
and prays the Judges to certify &c.

This becomes part of the Record, and lays y
foundation of a writ of Error. In Eng. tis no
part of the Record of the Ct below. 1 B et P.
32.

Writs of Errors.

A writ of Error. is a commission to y Judges of a Sub.
Ct. to examine a Record, on wh a Judgment was
given in a Ct below, to affirm or reverse it
according to Law. 2 Bac. 187. 3 Bl 407. Penkyn 25.
2 Inst 40. Yelv. 209.

In Eng. the writ of Error. does not summon the
Def in Error to appear. &c. It not being an original
writ, he is summoned by a "Sci Fac" audendum Error.
2 Bac. 207. 16. 3 Bl app^r.

Secus in Error & Swift 276.

Here it is an original writ summoning def in error.
to appear. to hear the original Record. and y
error assigned.

When founded in a mistake in the legal opinion
of the Ct below, it is not for the reversal of
such Judgment only, as are rendered on some
point of Law, appearing on the face of y Record.

But not to rectify an Error in the determination
of facts, or weighing of Evi - 2 Bac 189. 5 Com 286
1 Root 74. C. Cro. C 233. Owen 142. Dyer, 35, 1 Leon.
233. 3 Bl 407. 1 Roll 746. 3 Bac 407. 1 Roll 747.

By the term. "Writ of Error." without more,
is regularly meant one of y above description,
i.e. one founded in an Error in Law, and
apparent on the face of y proceedings or Record

2 Bac 187. 3 BR 407

But there are writs of Error founded on Errors in fact. i.e. on errors not apparent on the Record below. It is the sometimes called *Coram vobis* writ.

If on a Reversal, *Writ* in Error in Error can recover or be restored to any thing in a nature of damages, or debt, or any thing real, as land. it is considered in the nature of an action, and of course, a Release of all actions, will bar y writ. Aliter if its object only is to recover a Judgment of Reversal, and costs incurred in the Ct Below. Here it is not considered as an action, and consequently a Release will not bar it.
1 Inst 286. 6. 2 Bac 187. 225. 8 Co 152. 1 Roll 788.
2 Do 405.

'Coram
vobis'

There is another species of a writ of Error, founded on matter of fact. "*dehors y Record*" - This lies to such Cts of Error, only, as can try questions of facts. (but not to others, as to K B. or even to Parliament in Eng. but not in y Cohequer Chamber, for yt Ct has no Jury. Cro J. 5.
1 Vent 207. 2 Lev 38. 2 Bac 215. see Pleadings 313. "Parent and Child 63"

or such a writ may be brot in the Ct, in wh the original Judgment was rendered, and it is called a "Writ of *Coram vobis*" some^{times} "*Coram nobis*" it is called.

It is not strictly brot for an Error of y Ct, but consists of an Error in some extrinsic fact. As Judgment vs a Some Covert alone, y Ct not knowing of the coverture. The Baron and Some may join in the writ of Error, to reverse the Judgment, either before y Ct, yt renders it, or a higher one.

So also. if no an Infant, without his having appeared
by Guardian or "Prochein Amy" Yelv 58. Cro J. 10.
Kirby 116. Cro J. 5. Carth 112. 179. 3 Bac. 157. Salk
400. 2 Rolle R 53. 3 Com 177. 1 Vent 207. 5 Com. 286.
300. 2 Bac. 198. 217. 8. 228. Carth 367. FL 639.

But a Ct on information will appoint a Guardian,
"ad Litem" Plat 40. or 401.

So if a def dies "pendente Lite" and Judgment is
rendered. y Ct not knowing of his death. 5 Bac 143.
3 Do 218. Ray 59. 5 Com. 285. Kirby 232. Carth 338. 9.

If Shff return yt y original Party is alive, he may
come into Ct, and plead. "in nulla est Err"
Pleader. "death of Parties" Carth 119. So also, if a
Judge. who gave Judgment, was interested in
y cause, it is an Extrinsic ground of Err. 3 Com.
177. Str 639.

So if one sues. and recovers as Ex of B. J. J. J.
being alive. "Seemle" a writ of Err will lie
to reverse y Judgment, either before a higher Ct
or "coram vobis" 3 PR 129. Compare with 5 Com. 177.
689. 1 Rolle 744 Post 18. The same. if sued as such.
Owe no doubt. Judgment may be reversed in this
case in both ways.

A writ of Err will not lie on Judgment of a
Ct. not of Record - for it is founded on the Record.
as county Ct in Eng. 2 Bac 194. Co Lite 268. 6.
"a Ct of Record decides" "secundum leges et con-
suetudines" Bull 235. 10 Pra 744.

Nor on a decree or sentence of Chy in Eng. for
yo is not a Ct of Record. Remedy in Eng. is
by appeal to the "house of Lords".

But on a Judgment given in y petty bag office.
it does lie. viz B.R. for y^e Ct proceeds according
to y^e C Law. and does lie — is a Re of Record.
1 Mod 576. 3 B.C. 489. 2 Bac 794. 1 Roll 744. Dyer 315.

It lies on a Judgment of "non suit" and also by default.
Dyer 32. a. For 280. 1 Roll 744. 1 H B.C. 432. In Comm.
error may be writ on a decree in Chy.

There are 2 species of Error, on wh y^e writ lies.
In matter of Law apparent on the face of y^e Record.
and matter of fact. not thus appearing —

10. Still however. assigning error in Law and in fact
together, is ill. 2 Bac. 217. 8. 5 Com 300. Pl. 3. B. 15.
1 Sid 147. 93. Leon 105. Ray 231. 1 Vent 252. for
they require different Trials, fact by the Jury.
Law by the Ct. 2 Bac 217. 8. Yelv 58. Ray 59.

But y^e matter of Law and fact are ~~so~~
blended in the assignment. of Error, yet if def
in Error pleads. "in nulla est erratum in recordo"
He loses y^e advantages of y^e double assignment.
and waives all Exceptions. For a Plea of y^e kind
generally confesses y^e Error in fact. and there is
some room for one Trial, and perhaps not y^e 2.
for y^e confession may preclude y^e necessity of it —

If Def wd take advantage of y^e double assignment
he must demur. 2 Bac²⁹ 218. 67. Carth 388. 9. 1 Vent 252.
Lev 6. 5 Mod 113. 206. 1 Salk 263.

But it is said, a General demurrer wd
reach y^e defect. tho it is called duplicity — and y^e
reason is, y^e duplicity in a writ of Error. is not
within y^e 27. Clor. wh requires Special
Demurrer for duplicity. 1 Bac 35. 6.
2 Do 218. Carth 388. 9. (The St dont extend to it)

If y unsuccessful party shd assign infancy and coverture, both at once, it wd be duplicity, for either of them is sufficient to arrest Judgment. and each there shd be a distinct issue, as there always must be for every error in fact.

So assigning Several errors in fact, amounts to duplicity 5 Com 300. One is as good as a Thousand. if.

Secus. when several errors in Law. are assigned. duplicity ant inadmissible of mere matter of Law. for there can be but one Issue, and it reaches thro' y whole Record. Com Pl B. 10.

But for every error in fact assigned, there must be a distinct Issue. 5 Com 300. Pl. 3. 5. 16. for the former requires several distinct answers. and Issues. y latter answers the whole. "in nullo est erratum" answers the whole.

If an Error in fact be well assigned, def in Error. cannot prevail, n'r he traverse it. a there Plea. "in nullo est erratum" confesses it. Thus Plt in Error pleads. "he was an Infant" Plea in nullo est erratum" wd confess it. + Aliter. if not well assigned, then such a Plea does not confess it. as if y assignment contradicts y Record. Post 18. or alleges a fact, not assignable in Error. (Pl. 57. 4. 1. 93. Pl. 59. 231. 20 Dec. 218.) Pl. 9. 12. 29. 29

May 231. 1. 1. 1588

Decided by the Sup Ct. of Connt. yt assigning with satis Error in Law. Sufficient Error in fact, not assignable, does not vitiate y writ. This was in Special Damner. Kirby 27. 30. Fact consid^d as Surplusage.

In another case on Plea in Abatement founded on the blending of Error in Law and in fact. Sup Ct ordered the assignment of the errors in

in fact to be struck out and reversed for
y others. 2 Lev 279. Root 262. (Errors units of
Error are not amendable.

An assignment of Error in fact, wh contradicts
y Record. is not good. 2 Bac 218.9. 1 Roll 759.
do Mat the Ct did not sit on the day of y
date of the Judgment. That Plt in Error did not
appear. when his appearance is entered on the
Record. Cro C. 12. Cro J. 588. Kirby 154. Hob 204.
1 Root 762. Cro E 469. Dy Dy 89. Ray 331. 5 Com.
307. Salk 262.

To an averment. yt y Judge died before the Judgment
is inadmissible, because it contradicts y Record.
and therefore y Plea "in nullo est erratum"
does not confess it.

General Rule yt a def in an action cannot
assign. for error. what he might have pleaded
in Abatement in the original action, ni he so
pleaded it & his plea has been overruled.

He is deemed to have waived y advantage. 5 WR.
755. 2 H 36 267 299. Carth 124. Plea in Abatement is.

When error in fact is assigned, y proper conclusion
of the Assignment is. with an averment "hoc baratur"
1 Bac 512. Carth 307. 1 Com 300. ^{re. 3. 15} But this is disputed
y 58. 2 Bac 218. Conclusion according to theory
shd be to y Country. But there seems to be an
absurdity in this for wh Issue wd be thus formed.
"hoc baratur est renferre"

Thus if Infancy is assigned. Plt cannot make y
conclusion, no Issue is formed by it for no one
has said. that he was not an Infant. There
new matter is alleged. as in the case in a
Special Pleading in Bar. and shd be considered

in y same way, with a vengeance - The case in Yelv. cannot be Law.

By an Eng St. a Special Plea of Bankruptcy, concludes to y country. but this is a solitary instance -

General Rule, that for Error in fact - ut ante - a writ of Err. "coram vobis" lies. 5 Com 280. 1 Rolle 707 as in the case of a Female Covert and Infants. Supra. 4 Bac 39. 2 Do 210. 8 Tulk 400. 3 Com 177.

So if one sue and recover a Judgment as Ex^r or adm^r of D. G. he being alive. 1 Bent 237. Cro. E. 5. ante 10. 1 Root 761. 2 Lev. or Sho. 38.

And tho' it may be carried to a higher Ct. a "coram vobis" is the most usual way in these cases. But this Rule cannot hold. where y Ct. rendering the erroneous Judgment, cannot try an Issue in fact, as the Exchequer Chamber. Hanc!

But generally if the error is in Law, y "coram vobis" does not lie, since it wd refer y question to the very Judges who committed y alleged error. 2 Bac 210. 5 Com 206. 1 Sid 208. Contra 1 Lev. 149. Rolle 749.

There is an Exception when the error is occasioned by a default of the Clerk. of y Ct. or Shff. or other officer of y Ct. Rolle 746. 4 A B. 21.

For in these cases. the error is not by the Ct. tho' appears on the Record. Here Error "coram vobis" lies for error in Law. since in these cases y Error does not proceed. from any fault or mistake in the Ct. - If it were the fault.

of the Ct, error "coram vobis" wd lie. not lie. 5 Com 280. 1 Rolle 746 4 Mod 180.

So if y Error is in the process, error. "Coram vobis" lies.
for this is not an Error in the Judgment of y Ct.
The original Judgment is given in the Pleadings, of
wh y process forms no part. If therefore y Judgment
is vitiated by a defect in the Process, it is not
a mistake in the opinion of y Ct. 2 Bac 215. 5 Com
288. 2 Bl 279. Poph 181. 1 Roll 746. Co 6.

Process what? 3 Bl. 279.

Old Rule. yt a writ of Error, tho' brot on an Interlocutory
Judgment, wd not issue, till final Judgment, for
y Party might prevail after an Interlocutory Judgment
vs him and thus supersede its necessity. 1 Roll 769.

20. But in Eng. semble. settled, yt the Teste or date
may be before final Judgment. tho' return^d day
must be afterwards. 1 Sid 104. 406. 1 RR 280. 2 Bac
190. 1 Vent 250. 3 Keb 308. Lach 133. # 18 return
day of y writ of Error. 2^d July 1536. 6 Ann 2nd sess 2. 3. 4

Thus final Judgment may be awarded, and
a writ brot on an Interlocutory Judgment. Either
in Eng. or Court. Semble. and I can see, no harm
yt can result from this practice, by wh
useless and Technical objections are removed.
In Court the old Rule prevails, and their
Cts have decided yt an agreement of y Parties
to dispense with Final Judgment, shd not
supersede the Rule. Root 181. 291.

By Joint Parties.

It is a General Rule, yt where a Judgment is given
vs Several, all must join in a writ of Error. 2 Ann 1179
Cart 357. 1 Roll 707. 5 Com 280. 2 Bac 198. 3. Cart 7. 8

3 Mod 134.

And if one refuse, there must be a summons and Severance, for an Entire Judgmt must be ^{reversed} ~~reversed~~ in toto , and not at all . It wd be vexatious and inconvenient, if each shd have a Separate Suit.

But in Connt. & Sup Ct and Ct of Err. have reversed a Judgmt, as to some of y def.^s and affirmed it as to others. Kirby 114. as when there was a Jo Judgmt vs Several, some of whom were adults and others ^{Infants} ~~adults~~. Reversal quoad y Infants only, as they pleaded by atty. J. G. thinks it a Strange Rule.

But the C Law is otherwise. 2 Bac 198. 9. 228. 1 Roll 776. Cro B. 289. Is not the C Law Rule correct in principle? If y Infants had not been parties, y damages might have been less .

But even by the Eng Law., if y parts of a Judgmt. are separate, it may be reversed in Part , not as to y Parties, but as to Subject matter.

Str 198. 2008. 4 B. 2. 2022. Kirby 116. as when costs and damages were given, when damages only shd be given, it may be reversed as to y costs. and affirmed as to the damages. Carth 78.

So according to Connt decisions, if y Judgmt is severable. as Erroneous as to part of y costs. - as where there shd be no more costs. yⁿ damages.

So if Judgmt, tho not actually separate, is severable into parts. by any Rule. it may be severed and reversed as to parts. and affirmed as to the Residue. Case in Kirby 104. ¹⁰⁴ Contrary to principle see Root 138.

That y C Law Rule is Locus . 2 Bac 198. 237. 1 Roll 767.

Who may
have &c.

General Rule No person can bring a writ of Error in a
party or party to the first Judgment. 2 B&C 350. 5 Com 291
1 Roll 748. 50. as heir. Est. de. Grantor. and Grantee.
Particular Tenants and Remainder men. 2 B&C 195.
6, Roll 748. 9. Dyer 90. 1 Sid 317. 2 Do 56. Leon 261.

Who are Parties. see Pri. "42"

The Same Rule holds as deft in Error. It is precisely
reciprocal, and a party who brings the writ, must
be a Party in relation to the subject matter
as the Heir where the subject matter was an
Estate of Inheritance 1 Leon 261.

The Est where it is personal - as debt or damage.

General Rule No person tho a party to y original
Judgment. can reverse it, ni y Error was to his
disadvantage 2 B&C 195. 9. 2 Do. 46. 70. 5 Co 39.
8 Do 59.

Therefore if one of several defts obtain Judgment.
he cannot join in a writ of Error. to reverse
y Judgment as y others. 2 B&C 199. For 802.

1 Lev 210. Hob 70. Story 90. They alone must
bring it Cowp 425. for he has obtained all y
Law allows him. &c. his costs.

Exceptions. But y prevailing party may sometimes
bring Error. as where the Error is the fault of y Ct
and where it alters y manner of y Judgment -
(as omitting to arrest the Judgt writ &c)
as omitting to amerce y Party. in whom the Judgment
is where he ought to be amerced - This is allowed
for y sake of introducing Regularity into y Judgment.
Hardw. 57 For 971 7 Mod 780

So if in a verdict giving damages and costs,

Judgment is rendered for damages only. 2 Bac 220.
Cro B. 211. Yelv. 107. 5 Co 39. 8. do 58. 1 Rolle 759.

In these cases the Judgment is in itself defective,
i.e. incomplete, and in these cases, y prevailing Party
may reverse by a writ of Error. But it may be
asked. Why a Party, who is not injured, can bring
a writ to reverse y Judgment? The reason, is y
Judgment is incomplete, and another party concluded
by it. - It is in fact, no Judgment.

So if in a conviction of 2 defts, y whole damages
and costs are adjudged to one only, y other
may assign it over, for Error. Yelv. 107. n. Hard.
57. 7. Mod 180. 189.

So a Plt may assign for Error, y want of Jurisdiction
in y Ct. in wh he has brot y action. 2 Branch
126.

By a Super Sedes. is meant a suspension
of y right of y Party below, to take out Execution,
or to proceed under it, if issued.

In Eng. it seems, to have been formerly holden,
yt merely showing a writ of error to y adverse party operates
as a Super Sedes. till 4 days, being y time
prescribed for obtaining from the Clerk, in Error
an allowance of it. Rolle 492. had expired.
3 Bac. 210. Barris notes 367. 1 LR. 280. 1 Bet
P. 478. 2 Yelv 129. 2 Vent. 257.

But y allowance of a writ of Error, is a Super Sedes.
only for 4. days after Judgment signed, yt being
y time allowed, for putting in Bail in Error.

If Bail is then put in, y Super Sedes is then
continued, otherwise not. 1 LR 280. n. and Est may
be taken out and proceeded under it.

Bail
in Error.

Bail in Error is intended as Security for y def.
in Error. for satisfaction of y original Judgment,
in the Ct below. in y event of its being confirmed.

There is no Super Sedas. until Bail is entered,
for were it not so. y Execution might thro a
change in circumstances, become of no use to y Def
in Error.

In Eng. the recognizance of y Bail is with 2
Sureties in double y amount of y Judgment.
- Bac 572.3. 33y Jo 3. Sam. 1. and 13. and 16. and 17.
Ch. 2^d 1 Bac. 212.

This bond is meant to secure y def in Error.
all damages debts &c. due to y Judgment. &c.
So all wh. the Bondsmen become liable. 1 Hyl. 28.
The writ of Error it is said, is good, tho no
Super Sedas with the bond. Quere 2 Day 270.

In Count of a Sufficient recognizance with
Surety is taken, y writ of Error is a Super Sedas.
of the Ex^{te}. from the time of y Service, thenceforth
not. and it is a Super Sedas till service.
2 Day 370.

23. Ex^{te} and adm^{te} when def in Error in a Judgment
"de bonis H^{on} testatoris" may have a Super Sedas.
on a writ of Error. with Bail in England.
4 Bac 672.3. Cro J. 355. Not within y Jo Sam. 1.
because a writ in this case. brot by such a
party, is not within y Jo. wh requires Bail,
in order to make the writ. a Super Sedas.

In Count. Ex^{te} and adm^{te} must procure a bond
like other Plt^s in Error.

In Count. y writ of Error becomes a Super Sedas
of y Ex^{te} in y officer's hands, by a copy being delivered to him.

Time of Pleading in Abatement

There was formerly no Rule settled in Court.
as to y time of pleading in abatement of Writs of
Errors.

Admitted within y time allowed for other Pleas
Kirby 89. 90. Now. 1816. The Rule is established
in conformity to y Rule of y Sup Ct., 12. by y
second opening of y Ct. on y second day of y Term.

If one writ of Error abates, or is discontinued by the
default of Plff. in Error. a 2^d one brot on y
same Indgmt. is no Supersedeas. and if Plff
in Error is non-suited, he shall not have a 2^d
writ of Error. 2d Ray 97. Comb 19. 303. Faltk 263.

2 Bac 209. 1 Kirby 658. 686. Yelv 208. Moore 701.

1 Com 344. (~~not so here~~)

Aliter if it abate by act of God, or death of
Plff. inevitable accident, or death of Chief
Justice in Eng. 1 Leib 658. 686. Yelv 208. Moore
701. 1 Com 344. (*not so here)

Writs of Error not amendable, except to conform How far
to the Record. by the St. of Geo 1st. (not at all amendable.
by C Law) For amendments are allowed to conform
Indgmts and not destroy ym. - 5 Moa 16. 68. 1 Faltk
49. Carth 520. Com. Amend. 2. C. 4. 2 Bac. 202. 9

In Eng. a writ of Error does not abate by y
death of y def., but a Sci Fac lies vs his Exr
Treas of Plff dies. 2 Bac 207. 9. 1 Vent 34. 1 Faltk.
264. Yelv 208. Carth 236.

Quere in Court. Com. a "Amend." 2. C. 4.

This Rule must arise from the construction of
4 and 5th Anne.

Not a matter of Right

In Eng. and in Court. a writ of Error. is not a matter of right in all cases. For in Eng. it is to be allowed by the clerk. of Error. in all cases. before it is operative 1 Roll 492. 2 Bac 210. Falk 264. 321. 4 Bac 681. and in Court. y Judge applied to, to sign it is to examine y Record. and if he thinks. there is no probable ground of Error. will not sign it -

Does not lie in Discretionary Proceedings -
Error is not predicable in general of proceedings, which are entirely discretionary, as of y proceedings on a petition for a new Trial

Suppose a new Trial granted in a case, in which from its nature, it could not be granted - As Treason. Felony. De vs Def. or at C Law. for him. Could not this be Error? ante 5.6. But 47. or by a Ct not having power. to grant one. as by the Justice of y place. Error with'doubt wd be predicable. Curly 41.

Does not Suspend debt on Judgment.

Debt on Judgment may be sustained, notwithstanding a writ of Error. on the Judgment. For tho y Ct is superseded or suspended, y debt or duty remains. Since an erroneous Judgment binds, till Reversal by writ of Error. 7 TR. 458. 3 Wils 345. 1 Roll 742. C 35. 2 Bac 211. 2 Roll 490. Raym 120. 100. 8 Co 142. a 5. 1 Swift Lev 153. Suppose there is a Recovery, and the first Judgment overruled? This overrules y last Judgment also.

Proceedings in debt on Indgmt stayed—

(Debt on Indgmt may be sustained) wrong—

But in some cases, y Ct will stay y proceedings in debt on Indgmt, till a decision is had on y writ of Error. 2 IR 748. It is a matter of discretion with y Ct. 2 H Bl 372

But if a 3^d person obligates himself to pay what shall be recovered, in a suit vs a. B. he is not smable pending the Err. 2 H Bl 212.

As if a Recorery is had vs a. B. he is not smable pending the Err. and a writ of Error by him, such person may plead y pending of a writ of Error, in a bar of a Suit vs himself, on the obligation for pending y writ of Error, y Suit vs a. B. is not determined—

Not a Supersedeas of an Exⁿ executed—

When y Exⁿ is completely executed, as by taking def's body, and imprisoning him, y writ of Error is no Supersedeas. 4 Bac. 470. 1 H B 237. So if y property has been taken and sold. 1 Vent 30. 4 Bac 684.

But if goods are taken and ^{n^o} sold. 1 Vent 30. 4 Bac 684. But remain in the Shff's hands, when y writ issues according to 2 Role 491. 2 Bac 210. 11. 370. 4 Bac 684. It does. (S G says nothing)

But this seems not be Law. for execution when begun, must be completed. So decided in Eng. 4. Bac 684. yels 6. 1 Ventris 355. Falk 147. 323. La Ray 990. Cro E 597. Also in Connt. 2 day. 370. Post 568. 376. It is an indivisible act—

Jurisdiction on affirmance.

In a Judgment of affirmance, y practice is to allow interest on the original Judgment in Eng. and Court. So on a Non Suit. 1 B et P. 29. But in Eng. it is ^{not} allowed vs the Bail in Error. 2 H.R. 57 78. Doug. 723. see last p in this title exemplify it &c.

Bail's Liability

According to Court practice, an erroneous Judgment is as to y Bail, 1st original Bail, as a final one. 1st y original Bail, if not subjected by the 1st Judgment is not liable on its Reversal. 2 Inst 105. 5.

Root 375. This is by St.

See in Eng. 20ae. 212. Cro B. 34. v. For 419. 520.

General Rule. One cannot assign for Error, y^t which he might have pleaded in Abatement - Carter 124.

67th. 706. 2 H. Bl. 284. 299. For Exceptions to y^e Rule, see Pleadings. "Abatement."

Omitting to assign Errors.

If Plff in Error, does not assign Error, Judgment is not affirmed in Error, because there is no proceeding on it - But y first Judgment remains good - Deft in Error does not recover therefore costs on the writ but must resort to the Bond. 2 Bac 216. 1 Sid 294. 2 H. Bl. 32. Errors are returned after the return of y "Sci Fac" ad audiendum" &c.

If y Plff in Error is non-suited after assigning Error. "non-suited" There is no Judgment of affirmance or Reversal, but merely for def in Error to recover his costs - 3 H. and A

A Reversal of a Judgment in some cases overreaches

Effect of
Reversal

y proceedings on y Execⁿ on y original Indgmt -
 as if goods are taken on the Execⁿ and kept by y
 officer, or if goods or Lands are delivered to y
 creditor, at a valuation, and Indgmt is afterwards
 reversed. y Property is restored to y original
 def in Execⁿ. 1 R. Pltff in Error. 2 Bac 234. 370. 1 Rolle
 778. 3 Com 177. Cro J. 246. Yelv 179. 8 C. 143.

The reversal by destroying y Indgmt. destroys
 y Title acquired under it.

In others, it dont. The Rule laid down by Co.
 is. yt collateral things executed, are not divested
 by a Reversal. Collateral things Executory are.
 8 Co 142. a. and b.

Thus if Lands or goods have been taken by the Shff.
 and kept by him, or delivered to y creditor on
 appraisal: y property is restored by Reversal of y
 Indgmt. for y very ground of y Creditor, title is
 destroyed - The collateral thing is Executory. 1 Rolle
 778. 2 Bac 231. 2. 370. Cro J. 246. Yelv 149.

But if y property is sold by the Shff. on the original
 Execⁿ to a stranger, he will hold it, notwithstanding
 y Reversal of the Indgmt. (1 R. where y Shff is
 required by Law to sell.) for y Law will
 not vacate an act authorized and enjoined by
 itself -

If y property be lands? Rule contra in Count.
 sed Quere. 2 Bac 231. 3. Yelv 138. 8 C. 143.
 Cro J. 278. Mod 373. Cro J. 246. 3 Leon 87.

Here however. y party may have his remedy
 remedy, in damages, to y amount, for wh y
 property was sold. 8 Co 243. a. Cro J. 246.

So if one taken in Execution on the original Indgmt. escapes and before Indgmt recovered from the Shff for y escape, y original Indgmt is reversed. The action for y escape is gone by the Reversal of y 1st Indgmt. for "Mul Soil Record" may be pleaded to it by y Shff. Issues of y Indgmt and Est had been obtained as the Shff in y action, for y escape, before y original Indgmt was reversed, for the Indgmt vs y Shff wd remain vs y Shff, notwithstanding y writ of Error and the Reversal of y 1st Indgmt.

8 Co 142. 1 Saund 38. For here the collateral thing is executed (ie. the action vs the Shff is carried thro and finished). In this case, "Mul Soil Record" cd not be pleaded to y 1st Indgmt, y reversal being subsequent to the Recovery vs the Shff.

But in y last case, y Shff might be relieved by a writ of "audita Querela" Cro J. 646.
2 Bac. 246.2.

But suppose property taken and delivered, according to Law, at an appraisment into y hands of y Party, into y hands of y Party, in whose favour y erroneous Indgmt was, and he sells it, after wh y Indgmt is reversed, is y property restored to y Plff in error?

8 Co 143. b. Cro J. 278. 246. 138. 9. Brown 1078.

Seemle. it must be. The purchaser must look to his grantor's title and abide by it - for he has y means of knowing what yt Title is, and his remedy must be on the Grantor's Title - Covenant, or warranty of Title - (express or implied) if any. If not and no fraud practiced on him in y Sale, he must bear the Loss. 1 Bradd & CR 131.

And if a Shff shd sell property, even to a Stranger, when he is not bound by Law to sell it, it is restored on Reversal. 2 Bac 232. As case

of y goods of an outlaw. taken on a "Capias
ut Legatum" when the Sheriff is not required to sell,
but to keep ym for the King-

Here y Sale creates no Title, it not being warranted
by Law. 1 Roll 778. 5 Co 95. Cro E 278. 3 Bac 778.

It of Lim^s as to writ of Error barred in Eng-
within 20 yrs from y entering Judgment on Record.
2 Bac 200. 5 Com 290. Str 837. It 10 11. Wm 3^d
in the United States 10. yrs. by the Law of Congress.
In Court. 3 yrs.

Costs and Damages

When Judgment is for Def in Error, he recovers his
costs on Suit in Error. If for Plt^f in Error, no costs
are taxed on the Suit in Error, for costs are
considered as Penal. But if in this case,
y Judgment in Error, puts an End to y controversy -
(as it will generally, if y Def by Law be Plt^f
in Error, and prevails) he recovers costs on the original
Suit & costs under y name of damages, incurred
in the Ct below.

If y Judgment in Error, is for y Plt^f in Error, &c.
if Judgment for Reversal does not put a period
to y controversy, as it will generally, if y Plt^f
Def below is Plt^f in Error, and prevails, y original
cause may be entered for a new^d Trial, reversing
the original Judgment, or remanded to y Ct below
for yt purpose, as the case may be. Foot 357.

"In^d y Ct above, when yt can by an Issue in fact -

And if he finally prevails, he will in Ct. recover
all his costs, on a Suit in Error. - If he don't
proceed to further Trial by entry. &c and he is not
entitled to costs. 1 Com B 150. 150.

34.

If Plff in Err. has paid any thing on the erroneous Judgmt. he may recover y^e sum as damages. on Reversal. together with Interest. If nothing has been paid, no damages are recovered by him. ni for costs below.

But on Reversal. Plff in error recovers as damages, y^e costs wh he ought to have recovered below. ni he has further Trial, or as now. decided, he has a right to pursue y^e Suit further. 1 Com R 150.

If he has. or if y^e controversy is not ended. y^e whole of his costs must await final Judgmt. If he has a right to prosecute further, and does not, he loses all his costs and recovers only. what he has been compelled to pay. on the erroneous Judgmt. Com R 150.

On common cases. allowance of Interest on y^e original Judgments, is on Judgmt of allowance discretionary with y^e Ct in Eng^d 2 H Bl 384. 1 B et P. 29. So in Court.

It is not however allowed in Eng. in debt. on recognizance or Bail in Err. 2 YR 5778. Doug. 723.

Suppose y^e reason to be. yt y^e Bail is not within y^e St. It is however y^e rule of practice to allow it in all cases.

If original Plff reverses a Judgmt below. wh was vs himself, in a case where he has a right to prosecute further, does not, he loses all his costs, for his not pursuing his claim, is Err, yt it is a weak one. Thus the bill's declaration is alleged, insufficient on demand. demurrer, and he brings a writ of Err and reverses it, if now he don't proceed in the new action, he loses his costs, if he does. y^e whole costs follow y^e final determination.

Every State has its own Rules as to costs.

Upon a Judgment of affirmance in Error, & prevailing party is entitled to interest upon the original Judgment at & discretion of & Ct, for & suit of Error has suspended & Judgment, and delayed the collection of it, and Interest ought to be allowed.

It is, however, leaves it discretionary—
In Court, it is universally allowed, and as I believe, it is generally in Eng^d. See Court. 1 B et P. 129.

Cases exemplify & effect of an affirmance, or Reversal of Judgment on a writ of Error.

Count Below. A vs B.

Case. 1st Judgment below for a to receive 200⁰, and 10⁰ ^{costs} Judgment reversed for insufficiency of declaration, before A has collected any part of his Est. Judgment above is, & Judgment below, be reversed, and that B recover of a \$ 10. & amount of costs incurred by B in & Ct below.

But no costs are recovered by B in & suit in Error.

Case 2^d The case as before, in that A had collected & contents of his Est. viz. 20⁰ debt, and 10⁰ costs. Judgment of Reversal, as before, and & B recover 30⁰. viz. 20⁰ \$ be to A, on the erroneous Judgment, and 10⁰ \$ costs, wh B ought to have recovered in & Ct Below.

Case 3^d Judgment below in favour of A, affirmed in the Ct above, is & & Judgment below be affirmed. That A, the def in Error, recover his costs in the Suit in Error. The Judgment below is again operative. Interest on the 1st Judgment, is also allowed, if & Ct in their discretion. Think proper.

and Est issues for it. It Count 12.

Practice is to allow it of course. I believe.

Case 4th The Indgmt below was in favour of B. & Def. below. & by a writ of Error. reversed & Indgmt. - The Indgmt in this case, is merely a Indgmt of Reversal; if & Ct above is competent to try & question of fact. As B R in Eng and Sup Ct in Count.

A on the Indgmt of Reversal, enters & cause in & Ct above for the Trial & on final process. Indgmt if he prevails, recovers together with his debt and damages, all his costs, wh accrued before the Indgmt of Reversal, as well as those wh have accrued since. But he recovers no costs on the Suit in Err. If A had paid & costs taxed ~~on~~ him on the Indgmt below, he wd have recovered ~~no~~ on Indgmt in Err. as damages - But A must enter & action, if at all, at & same time, in wh & Indgmt of Reversal is rendered. - 1 Root 80. Practice 23 -

Case 5th The Ct. wh reversed the Indgmt in & case, was not competent to try & case. It must be entered in some other Ct.

Case 6th

Demurer in the last ~~case~~ ^{Ct} below. to & declarⁿ Declⁿ alleged sufficient. On writ of Error. Indgmt is reversed. Here it wd be generally absurd, for A to enter, since his declaration is adjudged invalid - and Def. below. never wishes to enter for Trial - Still & plff may enter, so ye if his declarⁿ may be helped by amendment, he may have an opportunity to do it. Ruled by Sup. Court.

Case 7th Declaration in the Ct below, adjudged insufficient - Reversed on writ of Error. Here

A enters for Trial, if y Ct above can try y question, of fact. for he has a good declaration, y merits have not been tried, since y Ct above have rendered only Judgmt of Reversal, not a Judgmt. "quod recuperant" and y Ct above cannot in y Judgmt of Reversal ascertain y damages.

Case 8th Plea in Bar deemed to below. and adjudged sufficient. Judgmt reversed. A enters for Trial: for as yet there is no Judgmt for A to recover. and on the face of y Record. for ought yt appears. he has a right to recover.

Case 10th Plea in Abatement, Judgmt below that y plea abate - Judgmt reversed above. Pltff enters for Trial. for he has a good Writ and has a right to prosecute to final Judgment.

Case 9th Plea in Bar. alleged insufficient Below. Judgmt reversed above.

If a shd enter, it wd be to no purpose. B don't wish to enter. for his object is only to defend. and that object is attained by the Reversal.

Case 11th Plea in abatement, as in case 10th. Judgmt of "Respondens ouster" in the Ct below.

Reversed in Error. A cannot enter. for he has no writ. May he not enter. if his writ can be amended as in case 6th?

Case 12th Of Error is birt for y admission or rejection of Evi. Pltff in below. may enter for Trial on reversal, whether he is in Error. Pltff or Def. and whether y Judgmt on Reversal is for or vs him. As A's witness was excluded below. — on a bill of Exceptions, y Judgmt is reversed. A enters for Trial. Here he is Pltff in Error. and

and y Judgment in Error is in his favour.

B's witness was excluded below. Judgment reversed. Here B is Pltff in Error. and Judgment in Error in his favour. Yet A may enter for Trial, if he please. for he may properly (possibly) prevail notwithstanding y admission of B's witness-

Note in all y cases above, in wh y original Pltff is supposed to enter for Trial on a Reversal of Judgment, y Ct above is supposed competent to try questions of fact. If it be not y case, y question is remanded to the Ct below. and there y final Trial is had. vide 4. and 5. cases. "Supra. It Cannt"

Where the Judgment in Error puts an end to litigation between y parties, y action is never entered in y Ct above. nor remanded for Trial. The litigation is always ended, when the Judgment is affirmed. But in many cases. Secus. on a Reversal of Judgment.

Mode of
applying for.

New Trials

A new trial requires no definition-

The mode of obtaining it, in Eng. is by motion, made in Bank. (in y Ct of Westminster for instance) and not at Nisi Prius. where the first trial was. Granting a Rule to show cause. on y motion, suspends the Judgment. i.e. prevents it from being entered up. and y reasons of y motion are afterwards discussed in Bank.

It may be granted at any time before Judgment, but never after. Doug. 760. - Generally after verdict

and before Judgment-

When this country was first colonized, new Trials were not known in Eng.^d. The Remedy was by attain^t. So yt our Cts having no Law to direct them, made their own Rules.

An application for a new Trial, is in general considered 46. as an application to the discretion of y^e Ct. Therefore they are not usually granted, when substantial Justice has been done, tho some mistake may have intervened. 2 Nels 306. 7 Bull 326. 3 East 457. 12 S 338.

3 D R 371. 2. 4 D R 459. 16 D R 394. & 397.

Aliter when a point is saved by the Judge. In such case, y^e Ct considers itself in y^e ^{relation} place of a Judge at N P. 1 B et P. 338. 38. § 9. 1 B et P. 398.

4
Hence when verdict, is found for def. in what is called a hard case, as in a prosecution under y^e game Laws, wh are consid^d odious. The Ct will not grant a new Trial, even tho there were an Error as to y^e admission or rejection of Evi. or any other mistake. 1 G R 469. Where La Renun speaks, a presumption raised by the Jury contrary to Evidence. In wh case, no new Trial. if y^e verdict, is according to Equity and conscience. 3 Bl 391. 2. 2 Moa 118. 644. 1 Burr 304. 9. 2 G R. 4 § 9. 1 B et P. 388. 4 G R. 469.

The Rule dont apply in all cases. Post 57. 61. 2. 67. Hence not granted to def to let in in defence of infancy - coverture. &c. It Lim^t or any unconscionable defence. in general. 1 B et P. 52. 454. 1 Bl R. 35. It 1242. Post 67. As to the It of Lim^t quere.^s and see 1 B et P. 228. 3 G R 124.

On y same principle, y Ct can impose such term, as it please. upon y party, in whose favour it is granted - admission of facts. production of books. and papers. &c. On Eng. Examination of Witnesses in form. 3 Bl 392. Salk. 648.

47. To discovery of certain facts. under oath. 4 GR 529.

In Eng. if y ground of application is any thing, wh passed in Ct at y Trial - The information, on wh y Ct acts, is taken from y Judges Reports at 4 GR by affidavit. If it didn't appear at y Trial, it is declared ^{misapprehended} at y Trial. 3 Bl 397. 1 Sid 235. 2 Lev 160.
4

Error is not predicable of y decision of Ct. in granting or refusing new Trials, it being matter of discretion. Kirby 941. 2 Day 364

Where suppose it granted in a case. in wh it ant grantable under any circumstance - ?

As vs one tried for Felony - On this point authorities differ - ante 57. post 76.

48.

There were not known in y ancient practice of y Eng Ct. The only remedy for a false or unjust verdict - being by attain - Bl traces ym to y reign of Edw 3^d and others to y time of Cromwell - Indeed they had not become general and settled, till after y Restoration 3 GR 131. St. 101. 3 Bl 387. 8. 1 Burr 304. Salk. 648. 5 Bac 240. Str 662. 235. 1. 213.

The causes in Edw. 3^d were misbehaviour - in Cromwell's time, excessive damages, as affording a presumption of misbehaviour - But since those times, they have been granted for various other reasons, and have contributed much to a just adminⁿ of Justice - 1 Burr 94. 5.

In Eng. they have of late yrs. been granted
 (where grantable at all) as well after Trials at
 Bar. as at A P. and for y same reason, an
 improvement, tho' formerly they wd be ^{impr.} ~~impr.~~ ^{impr.} ~~impr.~~ ^{impr.} ~~impr.~~
 as in such an event, y case wd have been
^{re}adjudged by the same Court. But Judges
 sometimes give a premeditated opinion, wh^{ch} they
 are unwilling to retract 1 Burr or B. 395. It 585.
 1105 5 Bac 243. 1d Ray. 1358. 1360 Bac Trial L. 60

Formerly holden, that no new Trial sh^d be granted
 in these cases, viz for misbehaviour of Jury. 5 Bac
 243. 1 Sid 48. Salk 664. 7 Mod 37. Bac Trial L.
 32.

Among the general maxims now is, yt in all 49
 cases of sufficient importance, a new Trial may
 and ought to be granted, if it can be made
 to appear, that injustice has been done, at y
 first Trial. 5 Bac 246. 3 BL 388. 92. Burr 395.
 203. 9. 665. 2093. 6 Y R. 788. 11 Mod 202. 401 R. 758.
 It is not "Prote Puri" Bac. Trial L. 4.

General Rule yt motion for a new Trial cannot
 be made, in Eng. after motion for arrest of
 Judgment, for by it, y motion verdict is admitted
 to be good. Salk 647. But y General Rule
 cannot hold "ex concessis"

Exception, when y ^{cause} case of new Trial was unknown
 at y time of moving in arrest - 5 Bac 261.
 "Trial" L. 1. Bull. 325. 6. Bull not universal.
 Quere y reason of it. If Judgment sh^d be
 arrested, y granting a new Trial wd be
 useless. Salk 647.

It has been holden, yt where there are several

def^t and all convicted, or part convicted, and part acquitted, no new Trial can be granted, as to one or a part of ym. for y verdict, it is said, must stand or fall "in toto" ante 20 Bull 326. Salk 362. 12 Mo. 275. 3 Feb 656. Id. 314.

This seems now to be overruled in Eng, and a new Trial may be granted for one or part of ym only, and y case wd be a very hard one, if an innocent man cd not have a new Trial, merely because another was joined with him. 6 GR 638. 619.

On cases of y s kind. when a new Trial is granted to one of several def^t, when the Record goes down for a Second Trial, y one convicted in y first, and he only is to be tried, for the other having been once acquitted, cannot be tried again -

Causes of Granting &c

57. 1st Want of due notice to def^t of Trial. 5 Bac 241 Trial L. 1. 2 Salk 664. ⁴ 435. Bull 324.

In y case of y want of notice, and non appearance of Def. y Ct. I presume, are not left to their discretion, so far as to refuse a new Trial, because Justice has been done. - for there has been no Trial and Def. has an unqualified right to be heard. Quere. consent of Parties can remove all other objections to Jurisdiction, than those wh relate to Subjectmatter -

2^d For defect or mistake in y Judge. before whom. &c. &c of defect - when y Judge is interested -

5 Bac 244. 11 Mod 119. of mistakes in admitting improper Evi, or excluding yt wh is proper -

5 Bac 244. "Trial" L 3. 6 Mod 5. 242 7 Do 53. 64. 102. 104. 202

So of a misdirection of y Judge in point of Law.
Bull 327. 4 T.R. 753. any mistakes wh might
have influenced y verdict

In some cases. new Trials have been granted in
Bank. for misdirection and admission of improper
Evi. by the whole Ct on a Trial at Bar - not
common however. 1 Burr 330. Ho 580. 1108. ante
48. 2 T.R. 5

The grounds for granting a new Trial in Eng^d
at Bar. are great value, probable length or
probable difficulty in y Trial. Doug. 420.

No New Trial for misdirection in Law. if justice
is done. - 2 T.R. 5. Tho' y improper admission
or rejection of Evi is good ground for Trial.

Yet y incompetency of a witness (not objected to at y
time of y Trial tho it be not known) is not a
substantial ground for a new Trial, it may have
its weight among other things - 1 T.R. 7. 17. or 717 Decr 1857.
Salk 613. 12 Oth 184 10 B.R. 1150. n

If upon an objection made to an inadmissible witness,
he is admitted by the Ct, or proper Evi is rejected,
in either case y suffering Party may maintain
a motion for a new Trial - Pre Chy. 134. 1 Bac 324. 5.
But the last cases proceeded on the ground of neglect.

The Infamy of y witness was known at y Trial,
but y Record was not adduced. 1 T.R. 77.
1 B et P. 30. n) But y cases contemplated by the
Rule. must be those, in wh y objection was not
taken, or fact of Infamy not proved at y Trial.

If y facts were not known at y Trial, a new one wd perhaps be granted, sed Quere, for it has been determined in Eng. yt y incompetency of a witness arising from discovered after y Trial, is not of itself a sufficient ground of granting a new Trial if y fact, he was called on to prove, was established by other Evidence, or not denied and defence proceeding on a collateral point. 3 East 457.

Character of y witness produced-

of this he must take his chance, Formerly held, yt witness might be interrogated as to y fact of his conviction - But it now is, yt it must be proved by Record. If Record of his conviction had been produced at y Trial, y Judge wd not have admitted his testimony, but, as ys was not done, y Party Guilty of neglect, ought to suffer for it.

3^d For defects or incompetency of y Jury, or any one of ym in certain cases. As If a Juror might have been challenged, as Incompetent, but y fact was unknown at y time of y Trial, by the Party, as whom se. 5 Bac 264. 7 Mod 54. 1 Vent 30. Still or Ser 120. Quere on cause of challenge goes to y Impartiality - Case in vent 36. New Trial was refused on the ground of Laches.

Does not appear, but that def knew of y cause of challenge, at y Trial - In Style 120. party must have known of y cause.

4th Misconduct of y Jury, as corrupt practices - partiality - Inattention - If they refer y decision to chance. 5 Bac 200. 88. 91. Bumbury. 57. 2 Ser 140. Pleas 14. or 17. 3 Bac Trial L. 4. Verdict h. 5k 612.

To for misconduct of one Juror., as when y foreman had declared yt y Plf^t shd never have a verdict, whatever Evi. he advanced. 5 Bac 257. Trial L. 4. Salk 640.

Jury not unanimous. In very early times, perfect unanimity was ~~not~~ not necessary. in the Jury. but for a long time past. it has been - 5 Bac 278. 3 Bl 375. 6.

In Eng. if they don't agree, during the Session. they are to be carted round y ^{circuit} county, till y end of y same Term. and y Judge will not receive y paper. till they do agree. 5 Bac 287. Verdict J.

This has been done by the N. E. circuit Ct. 3 Bl 375.

But both in Eng and Court. if y Jury are not ultimately unanimous in their verdict, it is in strictness bad. and must be set aside -

5 Bac 291. Comb. 14. Kirly. 141. 410. 2 Lev 208.

Bac. Trial L. 4. Verdict H.

An expedient has been resorted to to evade y rigor of y Rule. and this is by permitting y minority to come in silent. i.e. without directly objecting or dissenting. and the dissenters are not afterwards permitted to testify. or dissent -

Misbehaviour of y Jury. In Eng. after y Jury are locked up, it is misbehaviour in ym to eat or drink without liberty from y Court. till they have agreed in a verdict.

5 Bac 290. "Verdict H" 3 Bl 375. and returned it to the Judge. Moore 33. 1 Vent 120.

But y verdict is good. notwithstanding their eating (unless it is at y expense of y favoured party.) tho they are liable to be fined.

Co Litt 227. Dyar 218. 12 Mod 111. 1 Lem 132. Ld Ray 148.

If the Jurors eat or drink at y^e expence of one y^e parties, before y^e verdict is agreed, on and returned, and they find a verdict in his favour, it is bad, and there must be a new Trial 5 Bac 290. verdict H. 1 Bent 125. Co Litt 227 12 mod 111.

Privy Verdicts— For y^e purpose, of relieving the hardship of confinement and abstinence, till y^e verdict is delivered into Ct, privy verdicts have been devised in Eng. i.e. verdicts written, sealed, and delivered to the Judge, out of Ct. Yet a privy verdict is not binding upon a Jury. They may vary from it, in the verdict given in Open Court. 5 Bac 282^d. Co Litt 227^d *Verdicts b. h. Mod 33 Plowd 211. 3 Bl 377.

So yt a privy verdict in effect only amts to y^e. yt y^e Jury's drinking or eating after it, at the expence of one of y^e Parties, does not vitiate y^e verdict, ni they change it in favour of y^e party treating 1 Bent 125.

For in y^e case, there is a strong presumptive Evi of fraud. If they do thus change, it will be set aside.

Privy verdicts cannot be given in case of Selling nor in any case of life or limb, nor where y^e personal appearance of y^e def is necessary, to his conviction. 3 Bac 283. Ray 193. Bent 97 Co Litt 227. For the Jurors in such case must look upon the Prisoner, when they deliver the verdict—

1 Contd 10th 401.2. Receiving Evi out of Court. It is said in Baughn. 147. The Jury have a right to find y^e verdict, partly on their own personal knowledge. This don't seem to be Law. 1 Sid 123 3 Bl. 374.5. & 5 Bac 289. Verdict h—
289

It is a Rule, sensible, that no Juror has a right to communicate his knowledge to his fellow^s after they have retired - if he does, y verdict must be set aside. He shd tell it in open Ct. 1 Mc Nally 238. Aliter the verdict is bad, for each Party has a right to cross-examine - So it also seems to be inferable from granting a New Trial - because y verdict is contrary to Evidence.

Besides he aint under oath.

58.

The Jury have no right to re-examine a witness in private, after retiring - Cro E 189. 411.

44. 5 Bac 288. Verdict H. Verdict is bad and a new Trial is grantable -

If the Jury take with ym. any written Evidence not exhibited at y Trial, ^{without consent of the parties or leave of Ct.} y verdict is bad 12 Mod 250. and tis a cause for a New Trial. 5 Bac 289. 6 E 411 Verdict H. 2 H Bl 418. 1 Sid. 235. 6 Lit 227 La Ray 148.

In Eng. the Jury cannot take with ym. any written Evi, tho exhibited at y trial, without y consent of y Parties, or leave of y Court. If they do, tis a high misdemeanor - Co Litt 227 * and in most of the U. S. I think -

But if y writing furnished Evi on both sides, y verdict is good - Aliter not - It may be important on one side - Less on the other - 5 Bac 288. 2 Role 714. La Ray. 148. Cro E 44.

This distinction is a vague one - Latter Rule not so strong as y^t. relating to Parol Evidence, rec^d by the Jury. for Parol Evi may vary 12 Mod 250.

But this a Juror's misconduct vitiate a verdict, yet they are not permitted to testify to y fact. The Err of it must be derived "abunde" "olivi Contra" semble. 5 Bac 288. Os E. 189. 1 J.R. 11. Barnes. 438. 41. Seeus formerly.

May not one Juror testify to y misconduct of another? Reason why he cannot testify to his own, is probably not only y maxim, yt no one need examine himself, but also the power. it wd give any unprincipled Juror to set aside any verdict.

If y foreman delivers a wrong verdict by mistake, it may be set aside, and a new trial granted, and the Jurors are admissible witnesses to know y fact. Tho perhaps not compellable to testify to it. I G think. They are compellable - 1 Burr 380³.

The Juror's finding a General Verdict, when directed by the Ct. to find a Special one, is not regarded as misconduct. But in such cases, y verdict is vs the opinion of the Ct. and there may be a new Trial granted -

This finding a different verdict, is only an auxiliary reason, and is not sufficient "per se" 1 Pitt 213.
5 Bac 257. ^{Mod. 2. 4.} 7 Mod 37.

The latter case cited, seems at first to impugn this Rule, but that was a motion after a Trial at a Bar. A new Trial was refused -

In Cases where the Jury have misconducted, "ut Supra" motions in arrest of Judgment are concurrent with new Trials - see Pleading -

5th Finding General Verdict vs direction -

This is not illegal conduct. This direction is generally founded on the application of one Party or Both. If ^{vs} y opinion of y Ct. a new Trial is granted (The Jury have a right to find a General verdict, wh y Ct cannot control.

60-

6th Verdict vs Evidence wh is a cause of a new Trial in Eng. 2 Str 1105, as well as in y Country. 1 Comm R 427. 5 Bac 246. 7. 90. Cowp 37 3 Bl 392. Bull 326. 7.

This Rule has been much objected to, as it is y province of the Jury to determine y credibility and weight of Evidence or Testimony. But it is to be observed. That y Ct try every issue of fact, as well as of Law and the Jury is only y instrument, by wh the Ct try questions of fact: as the Record is an Instrument by wh it is tried - or as a question of marriage is tried by a certificate - ^{don't} Infancy, by Inspection &c. However the Ct decide y question, when they thus grant a new Trial, they ^{merely} must take it from one Jury, and give it to another - and such power is absolutely indispensable - in the Ct: for in cases, in wh y verdict is ^{vs} the weight of Evi, and this manifestly - a new Trial will be granted.

The Ct must either presume corruption or obstinacy, or ignorance, neither of wh shd bar y gates of Justice. Not granted in this case, if y scales of Justice merely balance. 3 Com 2 392.

But it has been said, ^{yt} in this case, there must be no Evi in support of the verdict, or so little, yt it amounts to nothing at all. Str 1142. 1106.

But this seems now, not to be the Rule, and it is now held, yt the Ct ought to grant a new Trial, if in y opinion of the Judge, y verdict is clearly vs the weight of Evi. The matter must be handled delicately, as Evi is the Jury's province. Bull 327. 5 Bac 247. ^{Chitty} L. 4. 1 Burr. or Bac. 322. Bames 322.

7th If the Jury have given a verdict on y misconc^e, of a point of Law, or generally vs Law, a new Trial is granted. Str 425. Fulk 646. Comb. 402. 2 Blk 1078. 2 Wils 307. 8. 4 YR. 467. La Ray 147. Not many cases of this kind. 1 John 279. Str 425.

62. No new Trial has been granted for y cause, where the case was a hard one, or where justice has been done. 2 YR. 5. 5 Do 425. As in point of Law. Plt^y was entitled to nominal damages only and the verdict is for the def.

New Trial Trial is not granted, because y cause is too small, and justice has been done. 4 Burr 2093. 4 YR 748. ^{see} ^{Wils} L. 4.

These cases may occur, when either y facts are agreed upon, or when the Evi is perfectly clearly, and the Jury makes a wrong conclusion from. But if a Judge makes a mistake as to Law, y Ct feel themselves more under an obligation to grant a new Trial, ym when it is done by the Jury 2 YR 5. 5 Do 425.

8th Smallness of damages-

Is a cause for a new Trial - But this is granted, if sum. mis is 5000. in an action on a contract

or promissory note &c. or for a sum liquidated, or on a bond or note without Indorsement, and no Evi of paymt. and the Jury find, but half y amt, it is y duty of y Ct to grant a new Trial. 2 Co 21. 5 Bac 248. Trial L. 4. 2 Str R. 940. 20. 1057. 1 Barnes 332. 2 Do. 366. 4 IR. 655. Bull 327.

No case of "Fort" in wh y's ground has prevailed, and y General Rule is no it, altho Barnes thinks, it shd apply 2 Vol 10 384. and Ibid and B & C concur.

The Rule. however. restricting new Trials, for smallness of damages, to contracts, or some liquidated sum., does not hold, when the Jury have made y damages small. This mistake in point of Law as by supposing one of the Pltff's grounds of Recovery wrong where it was not. and where Pltff has been deprived of Just damages. by an unfairness, as deceiving the Jury in computation &c. In these cases. however. it is not y smallness of y damages "per se" wh occasions y new Trial - 2 Str R. 947 but y fraud or mistake producing it, 5th 425, 1289

9th Excessive Expensive Damages.

This is a good cause for a new Trial. in case of contracts and Forts (John held contra in y case of Forts) Bull 327. Comb. 17. Str 426. see 3 Bac 249. "Trial" L. 4. where it was granted, because damages were excessive, and the Jury appeared partial

As to the Rule now is. see 1 Burr. 659. 3 Do 1846. 6 Comb. 337. 4 IR. 657. 7. Do 529. 2 Mils 244. 405. 3 Do 62. Str 6912 5 IR 257. 1 IR. 277. 2 Str 49
Comb 231

Of by mistake of the Jury in computation, &c
 Pltff has a verdict for more yⁿ is due, where
 there is a fixed rate of damages, as in an action
 on a note of hand. - New Trial not granted, if
 Pltff will release the Excess. 7. 1 R 113.23. Ch. 213.
 14 Bl 88. Corp 571. Boyle 90. 2 Mil 262. East 637.
 Post 73.

So if mistake is occasioned by Pltff misconduct.
 Ch 213. note D Reeve. found in the books. 120
 Applications for New Trials - for excessive damages,
 and only 3 granted !!!!!

From y^e current of cases, presumption of partiality
 so much urged, by some as the grounding Criterion
 in causes for new Trials, on y^e ground seems
 unnecessary. Tho some even of y^e modern authorities
 look y^t away. 5 Com. 155. 2 Bl.

Suffering a default is only an admission, y^t
 something is due, & in y^e action is but on a written
 Security, & if in this case, Judgment is taken for
 too much, a new Trial may be granted. 4 1 R.
 302. Ch. 195. Bull 278. Sid 494. 3 Mil, 155.

Crim
 Con.

A New Trial has never been granted for excessive
 damages, in cases of Crim Con. 4 1 R 651. 5 Do 207.
 5 Bac 629. 1 1 R. 277. 1 Burr 609

La Kenon seems to doubt. 4 1 R 654. 5. whether
 a new Trial may not be granted here. - B Bull
 thinks they may in some cases, and with
 him B G. concurs.

New Trials on this ground, granted in case of
 default and Battery - 1 1 R. 277. 5 Do 257.

How is it, for detaching Plt's daughter -
 No case of New Trial 2 IR. 5. 167. 3 Nils 18.

In case of Slander, sensible, new trial may be granted.
 5 Bac. 257 ^{Trial 24} Pl. 90. 2 Do. 200. Str 642. 2 Salk 544.
 1 Burr or Bac. 334. No case. I believe, in wh it
 has been granted in Slander, for excessive
 damages only. In Str 462. y misconduct of y
 Party was an Ingredient - 2 Nils 249. 1 Lev 97.

In actions on y case, brot by a Parent, "per quod
 servitium amisit" for an injury done to his
 child, excessive damages is rarely a ground
 for a new Trial, for here y damages are in
 a great measure presumptive - 2 IR. 5. 167. 3 Nils 10.
 or 18. or 118.

In actions relating to property, that is, there
 is in a degree, a definite Standard. But in
 actions for Personal Injury, y ground being
 more vague, y damages are more presumptive -

Ld Mansfield 1 IR 277. says yt it may be
 granted in any case, whatever, and tis a
 matter entirely discretionary with y Ct. - Where
 whether granted witht any standard, by wh
 to measure y damages - 4 IR. 259. This seems
 to be the true Rule. Ld Mansfield's opinion
 is well supported by modern authorities - Conn
 Trial Ct. 4 IR 657. 5 Do 257. 2 Do. 166.

2 BC R. 927. 1326. Hack 649

2 IR 143 Pl. 217. 1 BC 597
 1 IR 88. Cow 171 2 Nils 252

The strong language of Ld 2 Nils
 200. 400. 44. Contraverted by a great number
 of authorities cited 5 Conn 155. 5 IR. 257. Salk 547

66. 10th Mistake of Counsel in Pleading, a wrong Plea in Court, is cause for a New Trial.

But I find no Rule in Eng. corresponding to you. scribble, rather from what is found in y Books. y^t it is not a cause for granting a new Trial.

In Eng. any number of defences may be pleaded. Secus in Court and this is y reason of y difference of Rules. 2 Bac 307. Trial L. S. 3 Bun 1385. East 657. 2 Gil 131. 5 Mod 222. 3.

Neglect of counsel or atty. not a good cause here y Remedy is no the atty- 5 Bac 307. Trial L. S. 6 Mod 22. 222. 2 Palk 645. 3 Morgⁿ 84. 112. 13. A Counsel neglects to attend.

Is it ever granted to enable the def to plead lunacy. It of Limit Infancy or Coverture? Semble not. Secus of Bankruptcy 1 Bet P. 52. 228.

I shd doubt, an even in Court, when Mispleading is made a ground for a new Trial, y Ct wd allow it for y purpose of letting in these unconscionable defences. I take, y principle to be, that these defences are founded on unconscionable public policy and convenience, and don't alter y Real right between y Parties themselves. Indeed this regulation "pro bono publico" they are directly opposed to y private Justice of y case, for wch new Trials are granted usually. 1 Bl'k 30. Str 1242. Bet P. 459. 54. 3 Gil 124.

In Court new Trials are never granted, except on petition (in case of mispleading) wh must state y Plea. he wishes to make, y^t y Ct see an it is satis. also y^t he is able to prove it, wh he must. do on y hearing of y Petition He must also show y^t y new one ed not be given in Evidence - under y General Issue in y former one - Post 578

How far is mere surprise by the introduction of unexpected Ev., or mistake, otherwise yn in pleading, a ground for a new Trial?

Com D. ^{Prin. Et.} 2 atk 310 Str 691. 2 J.R. 131. 3 East 167.
220.22. 1 B.L.R. 298. 3 Morgan 85.7.

On the Eng practice. This is not "per se" a substantial ground for a new Trial, tho connected with other circumstances, it will have some weight.

11th § of a material witness is absent.

This inevitable accident, or age, it may be a cause. 5 Bac 252. 11 Mod 1. 6 Do 22. A witness taken suddenly ill - The Trial 25

But in Eng. a new Trial is not granted for y^e cause. ni witness make affidavit of what he knows, yt y Ct may see, an it is material -

Salk 645. These will be granted in favour of of def in this cause, if y defence to is proved is unconscionable? 5 Bac 252 Trial L. 5. Pl 11. P. 9.

Thinks in y^e case it wd not be granted? Morgan's Essays 84.

For trial will not be postponed in such a case. 1 B et P. 452. "a Fortiori" a new Trial will not be granted.

So if y attendance of a material witness is prevented by Conn of y opposite party, as by arrest - 5 Bac 252. "Trial" L 6. So for robbery is any foul practice Post 72. 11 Mod 141.

But in Eng. Rule to show cause, is not granted if a material witness is absent wilfully, or thro negligence of his own. Remedy is vs witness by an action on the case. The remedy vs the witness

is however, so precarious, yet if he does not attend, when properly summoned, y^e Ct will grant a Capias for y^e Sheriff to him, and bring him into Ct., and will sometimes postpone y^e Trial until he can be bro't - but will never grant a new Trial for y^e cause.
Falk 653. Barnes 322. 5 Bac. 257. 2. Trial. L. 6.

A new Trial is never granted, for absence, of witness, whose testimony might have been procured by due diligence used by the Party.
5 Bac 252. "Trial" L. 6. Pl. 114. 1 Com 150
Falk R 647. Str 691. 1 Will 98. 2 Mod 22.
Pr Chy. 194.

It seems from 2^d atts 319. Str 391. y^t surprise by the introduction of unsuspected Evi, is no ground for a new Trial. But 1831 R decided contra in Ct in y^e case of Austin and Gayland

But there was in this case, a mistake in y^e Evi of one witness.

In Eng. a mistake made by a material witness in his testimony on Trial, is not a ground for a new Trial - It wd be of dangerous consequence to grant one. 5 Bac 253. Pl 117. Trial L. 6. 3 Morgan

70"

12th Discovery of new Evidence

This is material - Tnd to be a good cause for a new Trial in Eng.^d But the Law is not so.

Ed Kenon says, that as often as applications on y^e ground have been made, they have uniformly been rejected. It is settled y^t if by due diligence, y^e Party required might have known of y^e Ev, it is never granted. 12 Mod 584. 5 Bac 252. L. 2. Pl 16. Pr Chy. 194. 1 Will 98. 5 L.R. 269. Falk 273. Parby 282. 2 Lev 270. 1 B & P 428. 30. 1 R. 84. 24. 113. 713

713. 3 Margans Boaga 93.

13th Misconduct of y Parties Treating the Jury (ante 50.6) Keeping away parties witnesses, ante 68.
Good Grounds for new Trial ~~11 Mod 141~~ 11 Mod 141.
3 Bac Trial L. 5.

So if a party solicits a Juror to find for him, or makes any representations in favour of his own cause. &c and y verdict ^{is} in his favour. New Trial granted. 5 Bac 292. 2 Role 116. Pl 17. Moore. 652
Even tho from the Pri. y Jury cd not find otherwise" L; 73.

The same practice by the parties atty, has y same effect. as where atty before Trial wrote to 2 Jurors stating the hardship of his client's case - The Ct cd not enquire an it had any influence & not - 5 Bac 250.2. Trial L. 6. 2 Bent 173.

So any kind of Embracery practiced by either party is good ground for a "new Trial". 5 Bac 252.
Trial L. 6. 11 Mod 117. 1 Bent 120.

"Embracery what? 4th Bl 140. It is an attempt to influence a Jury corruptly or not. as by promises, bribes, persuasions - entertainment &c. 4 Com 140. 1 Haw 257-

In Jectment - In Eng. formerly holden, yt they were not granted in actions of Jectment - because the Jmagmt was not conclusive - 5. Bac 253.
Trial L. 7. 1 John 225. Salk 648. 50. In Connt. Jmagmt. is conclusive - no fiction there - Fr. 1105.

The Rule now is in Eng. yt in these actions, new trials are as ready to be granted, as in others, if verdict is for Pltf - Secus when for def.

"except for very particular reasons" When verdict is for Pltff it changes the posⁿ. See when for Def in Gectments (Where y parties are in statu quo"
1 Barnes 323 4 Burr 2224. 5 Bac. 253. trial L. 7.

Formerly holden. That after 2 similar verdicts - a new trial ought not to be granted - 6 Mod 22. 5 Com. 155. 5 Bac. 243. Talk 649. 1 Lev 97. 1 Sid 131.

Now not so often so ^{often} awarded, as in other cases. 3 Bl 387. But the old Rule is now exploded 4 Burr 2108. and there are instances, where there have been as many as 6. new Trials granted.

Lord Mansfield says. there is no good reason. for saying, yt a new Trial cannot be granted, because there has already been one 4 Burr 2128. and Ch. J. Parker. D. M^o ~~late~~ sitting in Philadelphia, said that he wd sit there and grant new Trials all y year. until doomsday. if y Jury continued to bring verdicts so manifestly unjust - James Parage granted 4. in action of Gectment -

New Trials not grantable on grounds not taken at y Trial. if it might have been there taken - 10 Mod 202.3.

Criminal Cases.

In general new Trials are not granted in criminal cases. as the def. tho they are in many cases in his favour. granted - 1 Root 857. Cowb. 37 3 Morg^e 108 2 Str 899. 1238. 1 Hills 17 3 do 59.

Generally in criminal prosecutions for offences higher yn Misdemeanors. new Trials are granted in Eng. to neither Party. 6 Y R 638. There cannot be a second Trial in such case. A man cannot twice be put in jeopardy of his

life, 12. but twice in trial for y same offence.

Note If one is clearly unjustly condemned, y constitutional power vested in the Executive, is a safe recourse.

When y offence is not higher yn a Misdemeanor, y Ct may grant a new Trial in defi favour.

See Ray. 53. 6 YR 638. Str 968. 1102. 5 Bac 255.
"trial" L. J. 5 Burr. 2669. a Libel case. So in case of Perjury. Doug. 760. 1 East 159.

Now for y Ct may discharge y Jury before Issue, is completed to them, or not agreeing in verdict— see 2 Hawk. C. 47. 31. Baym^d 84. 2 John 301. 4 Co 45. Carth 465. Lamb. 501 John 300. Godwin's case. I semble it cannot be done for a mere disagreement of the Jury. even perhaps with prisoner's consent. Clearly so. I think, without it. Case Cook, and others vs the People in Penn^a. cannot be tried twice— Shooter C. L. Kirklick's case. 16

But suppose Juror dies, or prisoner is taken ill, during the enquiry, in such and other of clear physical necessity, sembles it may be done— even in Felony, and a venue "de novo" awarded—

On Count new Trials are granted in favour of def. even in cases of Felony, not in favour of y Public. 1 Root 80. 7. So in the M. S. Ct.

But where y def^e offence don't exceed a Misdemeanor, y General Rule is, yt no new Trials can be granted ^{on favour of} the def or delinquent, y General Rule being that no man can be twice tried for y same offence. Str 105. 1238. 1 Sid 154. 1 Will 17.
3 Do 59. 15 Bac 254. Str 999 1238. 1 Barnes 316.

Bumh 253. Str 1102. 1 Lev. 124. 2 YR 484.
 2^d Dan? 53.

Exception, Two Exceptions to y last Rule. 1st Where def hav
 practiced fraud to obtain acquittal. Str 1238. 5 Bac
 204. 2^d Do by Bribing a Juror. 1 Root 83. Falk. 646.
 12. Mod 9. 1 Lev 124 contra cited 1 Leu Ray. 63.
 1 Root 507. Where if y case were capital?

2^d Where y acquittal is occasioned by the misconduct
 of the Judge. in point of Law. 5 YR 20. 4 Do 753.
 But. S. G. thinks, this wd not be good ground
 for a new Trial -

And on a "Qui tam" prosecution, a new Trial
 cannot be granted as to y Civil part, as it is
 grantable and granted as to y criminal part.
 1 Root 867. 10. if Def is acquitted from y fine and
 imprisonment, a new trial will not be granted to
 y Prosecutor, to reinvestigate part of y case.
 as y damages and forfeiture wd be claims -

A new Trial is ^{never} ~~now~~ granted to enable Def to
 plead the St of Limit. So in Court. it was refused
 when y object was "Usury"

Granting a new Trial after Judgment, vacates y
 Judgment: but Terms are imposed, when necessary.
 and if pending y petition for a new Trial, y
 Respondent die. his Ex^r may be cited in
 a "Sci Fac" (as in actions) and y petition
 may proceed, provided y right of action
 survives to or vs the Ex^r.

Note as to y contract. y St relating to
 abatement and amendment of writs. was
 made. before Court Cts had power to grant
 new Trials see Plowd. 7. 273.

If the right of action does not survive in y last case, y petition must abate, for no new Trial can be had., subject to y foregoing qualifications. The petition might doubtless proceed, if pending y petition, y petitioner sha die.

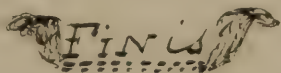
It has been observed, yt new Trials may be granted after final Judgmt on the original Trial. In such cases, it vacates y Judgmt. 1st. when the grant is unconditional, and the rights are determined by the second Trial.

As to costs, on new Trials see 3 SR. 617. 1 H Bl 637. Costs. 41. 3 GR 507.

In Eng when y costs are directed to abide y event of y Suit, if y party who was unsuccessful in y first suit or Trial, succeeds again 1st is ultimately successful, he shall have costs of both Trials - But if y party, in whose favour y Trial was granted, succeed in y 2^d Suit, he has costs in the 2^d only. Yet in y case, y other party has not costs of y 1st Trial. These are not awarded on either side - Supra as to costs.

But where a new Trial was granted, and nothing was said as to y Costs of y first, altho y same party succeeded in the 2^d trial, he shall not have y costs of y first. Long 421. 3 SR 508. 1 do 207. 1 H Bl 630. 641.

In Court. costs follow the event.



Pleading in Chancery

Of the manner in which Suits in Chancery
are instituted and conducted

A Suit in Chy is commenced on behalf of a subject by presenting a Bill in y nature of a Petition, to y Chancellor, or to y King, if y Chancellor is a party. Mitf 6.7. 4 Vern 385.

In some a petition is to y Sup Ct, or county Ct, "sitting in Chy" or as a Ct of Chy.

If y Suit in Eng is in behalf of y crown, y complaint is called an Information, exhibited by the Atty General or Solicitor General.

Mitf 7. n. 1 Vern 227 370. Hob 109. 4 Burr 2027
unt

A Suit by Bill, or Information usually called in Eng. "suit by Eng Bill" because both have in general been in the Eng. Language. Mitf 7.8. 1 Role 104.

Every bill must be founded on one or more of y grounds of Equitable Jurisdiction, If Jurisdiction in some cases extends to a decision of y subject in controversy Mitf 8. 32. 36.7.

In some it is only auxiliary to y decision of another Court or a future Trial Mitf 8. 32. 32. 130. 148. 2 121. 58. In the former relief is prayed - in y latter not. In some cases also where there is no actual Injury, provisional relief may be prayed vs. a threatened wrong. Mitf 8. Pre Chy 581. 1 atk 284.

And in Eng. a high Ct of Chy has cognizance

Bill for removal of Chits from inferior
 courts to itself by writ of Certiorari
 Mit 82. Not so in Court.

Every Bill in Ct. for a "Certiorari" requires an
 answer by the def. This is an answering, and
 becomes a part of a Court Roll - called in
 Court & record Mit 9. 244.

In Eng. y answer is under oath, in when a Peer
 or Corporation aggregate is def. In the first case,
 excepted it is made in the honour of y Def.
 in the last case under the Corporation Seal. Mit 9.

3. The object proposed in requiring an answer, are
 to supply the Plt with proof, and to discover
 what the def denies, and y grounds of y defence.
 where y sole object of y Bill is in discovery.
 Mit 9.

To every bill (in for a certiorari) y def must
 make defence in some way, in he disclaims
 all y right to y subject in question, and he
 must make answer, unless he disclaims, or
 can show Plt's right to compel an answer.
 Mit 10-97.

In Court on a Bill for a discovery, y def
 is bound to answer under oath, as in Eng
 1 Root 581. Formerly, however, y answer was given
 in Court "via voce" not so now in General,
 tho' y old Bill is made & believe, is still practised
 when y inquiry is a simple one.

4. In other cases, Def is not compellable by Court
 practice, to make any other answer, on y
 allegation in the Bill are not true, and even y

is seldom done. 1 Root 584. y hearing is usually, as we express it "at large" when y Petitioner is not demurred to -

The def may indeed make a particular answer, in every case. but except where a discovery is sought. y Ct will not allow it to be given in under oath. 1 Root 581.

In Court. when Plt compels a discovery by Def. under oath. he cannot contradict his Testimony by other Evi. 1 Root 558. (Not agreeable to the English principle -

The grounds on wh defence may be made, are various - some of ym extend only to y relief prayed. - not to y discovery. some to y discovery only, and some to both - an anomalous discovery is never compelled. Mit 11. 12. 102. 148. 153. 8. 10. n.

The defence may be founded. 1st On matter apparent on the Bill, or some defect in it, in wh case. y defence is by demurrer. Mit 13. 20.

2^d a matter not apparent, but stated by Def to defeat y Claim, witht a formal answer. (under oath" Mit 230. 9.

In this case y defence is called a Plea.

Mit 13. 14. The plea is confined to one point or ground of defence. as at Law. Ibid 15. 177. 233. 5. a sort of Special answer. Mit 8. 3. 10. 2.

3^d On matter in the Bill, and other matter offered in the defence. - So the Judgment is to be given on the whole case. as disclosed on Both sides - In this case. y defence is termed an answer Mit 13. 14.

5. All these modes of defence may be used in one case, if applied respectively, to different and distinct parts of y Bill Mit 13.28.

But def may avoid y necessity of defending at all, by disclaiming all interest in y matter in question - This proceeding is called a disclaimer. Mit 14.5.

1st A demurer admits y allegations demanded to, and in judging upon it, if in favour of y def puts an end to y suit to the Suit or so much of it, as the demurer extends to - Mit 14.10.
Judgmt definitive.

If y ^{demurer} demurer is overruled, Def may make a new defence. This may be done by Plea, answer, or demurer, in extensive, but not by a demurer of the same extent. Mit 16.17. Proceedings upon the new defence, y same as on an original one. Ibid 17.

17. The plea admits for y purpose of trying its own validity, all y allegations, wh it don't deny - Mit 15.238. 2 after 51.

But a Judgmt on the sufficiency of y Plea, is not definitive - If in favour of def. Pltff may afterwards deny the truth of it, by a Repl^d and they close an Issue in fact upon it Mit 15. In this case the Repl^d closes y Pleadings. Ibid 15.

If y Plea is overruled (18. Judgmt upon it for Pltff) def may make a new defence by answer, demurer, or new Plea Mit 17. So a new Plea allowed in C⁵

3^d The answer generally, denies y Pltf's allegation, or a part of ym, and states other facts to show y deft rights in y subject of y Suit. Mit 15.

8.

Sometimes however, it confesses all y Pltf's allegation, and with or without stating other facts, submits y case to the Judgment of y Co. Mit 16.

If y answer admits y material allegations in the Bill and states no new facts, or such only as Pltf is willing to admit, no further pleading is necessary, and Judgment definitive Mit 17.

But if y answer does not admit y material facts, or states any, wh Pltf will not admit, y Truth of y answer, "of" any part of it wh may be denied by a Repl^y? wh concludes y Pleadings. Ibid 16. 255.

A disclaimer as it admits no right in y Def and denies none claimed by the ~~def~~ Pltf, admits of no further pleading. Ibid 17.

When y suit is but to remove a suit from a Lower Jurisdiction, there is no defence and of course no Pleading beyond the Bill. Ibid 17. ante 1.2.

of the manner in wh Suits in Chy are instituted, and conducted.

When the Bill itself is defective, or y Suit in its original form proves inadequate to its object, by reason of intervening accidents, as often happens, a new suit may become necessary to continue - or render effectual y original Suit. Mit 18.

10. Suits for any of these purposes are commenced by Bill. Hence arise many of y^e decisions, under wh^{ch} y^e different kinds of Bills are classed. Ibid 18.

Errors and defects in the draught of a Bill are generally rectified, or supplied either by amendment or a Supplemental Bill. 1 Root 379. Those in the answer, by amendment, or further answer. Ibid 19.

By and to whom a bill may be exhibited

Regularly all persons and bodies politic may exhibit bills in Chy. tho in Eng. Outlawry Excommunicate attainder &c. are to a certain extent, disqualifying. Mit 24.

But Infants. Lame Coverts. Lunatics. Idiots cannot sue in Chy ~~sue~~ by themselves alone. Mit 24. 188. Sta 708.

1. First. an Infant in Eng. sues in Chy by his next friend. But the Ct will allow any person to commence a Suit in that character for an Infant. Mit 26. Pre Chy 376. 1 after 570. and the consent of the Infant is not necessary. Mit 28. 94. Jeffers vs Bishop.

The next friend is liable for y^e costs. Mit 20. Sta 708. 2 Ely Ct. 238. 2 P. Wm 297.

Tho if y^e Infant attain 21. and then proceeds in a suit thus commenced, he is liable for y^e whole costs. Mit 20. Sta 708.

Neither y^e next friend nor his wife can testify in y^e suit, he being interested in the event. so far as respects y^e costs. But if it be necessary

his name may upon application to y Ct. be erased
and yt of another inserted Mit 26. 3 alk 511.
Str 708.

Tho y Infants consent and necessary ante, yet
if it be represented to the Ct. yt the Suit is
not for his benefit, y Ct by some of its officers
will enquire into y fact. and if y representation
is found true. y proceedings will be stayed -
Mit 27. 3 P/Wm 140.

If 2 Suits are commenced for the same but bore 12.
by 2. next friends, y Ct will enquire wh is
most for his benefit, and stay proceedings
in the others. Mit 27.

In Court. Infants sue in Chy as at Law. by
Guardian or next friend

2^d Suits in Chy in favour of some covert are
regularly instituted by husband and wife jointly -
Mit 27. 25. 188.

But when she claims a right in opposition to
her husband, y Suit is brot in her name by her
next friend. But a Bill in such case cannot
be filed, without her consent. Mit 28. 2 Ves 452.
Pr Chy 376.

3^d Idiot and Lunatic sue in England. by
the committee of their Estates, i.e. those to whom y
custody of their Estates and persons is "committed",
by Ld. Chancellor. Mit 28. 3 P/Wm 106.
1 Equity Cs ab. 279.

Tho the atty General in some instances, exhibits
information for ym., they being considered as

under y peculiar protection of y Crown. Mit 28.
4 B. P. C. 559 1 Ch. C. 112. 158.

In Court. They are by their conservators, appointed by the Ct of C Pleas. St. Court 233.

Bills in Chy may be exhibited vs all persons, and Corporations Mit 29.

When brt vs a feme covert, her husband must be regularly made a Party, in y case of his banishment, abjuration, Mit 24. 30.

3 atk 473. 2 Vern. 104. 613.

2^d If she claims in opposition to him, or disapprove his defence. - She may obtain an order to defend separately. - 2 atk 30. 2 Eqty C. 66.

3^d If husband. is Plt in a Suit, and makes her def. no order is necessary. 3 atk, 478.

4th If he is without y Jurisdiction - 2 Vern 613.
14. Pre Ch. 328. In all these cases, she defends as feme sole. Mit 30.

When an Idiot or Lunatic is sued, y Committee of his Estate, must be made a party (Def) in Eng. - his Conservator in Court. Mit 29. 94. St. Court 233. The committee is appointed by the Ct. of course, y guardian for y purpose. If he has no Committee, or if y Committee has an opposite Interest - Ct appoints Guardian "ad Litem" 2 Bac. 680. Per 369. Mit 94.

So if Def is by age or sickness, reduced to second Infancy. Mit 94. Pr Chy. 429.

Generally, distinct and separate claims in diff persons, standing in y same relative situation, can't be joined in one Suit - As Land contracted to be sold to several, in parcels, they cannot

join in a Bill for specific execⁿ. 1 East 227.

Several Kinds of Bills.

Bills are divided into 3 kinds - 1st Original Bills. These relate to new matter, not before litigated in the Ct. by the same Parties, standing in the same Interest. Mit 31. Glende 19.

2^d Bills not original, nor are either in addition to, or in continuance of an original Bill, or both. Mit 31. 53.

3^d Bills in y nature of original Bills. There are bills occasioned by some former bill, and the object of ym. is to obtain y benefit of some former Suit. or Judgment. or a Reversal of some former Judgment. Mit 31. 3. 4. 36. 15.

There are not strictly original Bills, because they relate to matters before litigated, &c. nor strictly Bills not original, because they are not in addition to or continuance of any original Bill - but seek a sort of original relief.

1st Original. These are divided into those praying relief and those not praying Relief Mit 32.

An original Bill praying relief may be

1st a bill praying a decree of y Ct.

respecting some right claimed by the Plt^f. in opposition to some right claimed by def. Mit 32.

2^d A Bill of Interpleader i.e. a bill claiming no right in opposition to y right claimed by def., but still praying a decree touching

y ngth of def. for y safety of y Plt.
Mit 32. 47. 8. 125. Kind 26.

3^d a Bill praying for a writ of Certiorari
to remove a cause from an Inferior Jurisdiction.
Mit 33. 49. Kind 28.

Original not praying relief - are of 2 kinds.
1st Bills to perpetuate y testimony of witnesses -
Mit 33. 50. 130.

2^d Bills for discovery of facts, resting in the
knowledge of y Def. or of Deeds, writing &c.
in his custody or power. Mit 33. 52. 130. 148.
Kind 32.

17.

2^d Bills not original - There are 3 kinds,
1. Supplemental Bills, a bill of y^e kind
is merely an addition to the Original Bill
Mit 33. 1 Root 579.

2^d Second. Bills of Revivor - a bill of y^e kind,
is a continuance of the original Bill, when in
consequence of y death of a Party, or y the manner
of a Term Plt., y suit in its original form
cannot proceed.

3^d Of Revivor and Supplement, a bill of y^e kind
both continues y original Suit, and supplies
defects arisen since its institution. Mit 33.

III. Bills in y nature of original Bills, of
these y subdivisions, are numerous.

1. A Crossbill exhibited by def. v. Plt.
or other parties touching some matter in Litigation.
Mit 75.

2. a bill of Review to examine and review a
decree upon a former Bill. Mit 78.

3^d A Bill in nature of a Bill of Review,
but by one not bound by the former decree.
Mit 83.

4th To impeach a decree on the ground of
fraud. Ibid 84.

5th to suspend a decree, under Special
circumstances, or to avoid it, for reasons occurring
subsequent to it Ibid 85.

6th To carry a decree into Eff. Ibid 86.

7th In nature of a Bill of Review or revision.
it lies in certain cases, not admit
of a continuance - of the original Bill. Mit 66. 88.

8th in the nature of a Supplemental Bill.
Ibid 67. 89. Mit 34. 5.

Of the Structure and End of y Several Bills - 18.

1st Original Bills. 2. not originals - 3 in y nature
of original "ut ante"

1st of Original Bills. The consid^r of these will
in a great measure involve the consideration of
Bills in General.

1st Those praying Relief - 2. Those not praying
Relief.

First. Original Bills praying a decree of y Ct
respecting some right claimed by the Plff
in opposition to some right claimed by the Df.
must show y right or Interest of y Plff.

y nature of y inquiry - or in what he needs y
assistance of the Ct. and that he is without
adequate remedy at Law - Mit 37. 40. Root 578.

In Eng. a bill always prays that y def may
answer upon oath y several matters charged.
Mit 37. 43.

In Court, y^e Bill, and pray, an answer by def.
 in Bill, for discovery, (of wh^{ch} part) and in
 cases, in wh^{ch} he willing to rely upon Def^{'s} Ev^{'s}
 and in these cases, he must state, he cannot
 obtain ^{the} Ev^{'s} - In this way, he may pray for
 discovery only, or for discovery and Relief as in
 Eng. and he may pray a discovery as to part of
 y^e Bill only and prove the rest by Com Law
 Ev^{'s}. Root 378.

13. The prayer for an answer is, yt the def may
 answer not only according to his knowledge,
 but according to his remembrance, information,
 and belief, and to prevent evasion, he may
 insert Specific interrogatories, respecting every
 material fact alleged. Mit 43.4.

The bill then prays for relief, (by nature of wh^{ch}
 varies with y^e case) Mit 37.45.

The usual mode is to pray for y^e particular
 relief, to wh^{ch} the plff thinks himself entitled
 and then to add by way of caution, a general
 prayer for such relief, as y^e case may require.
 Mit 38.40. 2 Mod 91.2. Root 378.

As the prayer of particular relief may be framed
 with a double aspect i^e it may ask for this,
 and yt relief in the alternative, as the Ct
 may Judge proper. Mit 32.2 att 320.

20. But it seems, that a Prayer of General Relief
 is of itself sufficient, and yt the Ct under
 such a prayer, may adapt the relief to y^e case.
 Mit 38.3. & 2 att 3.141. 3 att, 132.2 ver 220.
 Root 378.

Lastly a bill in Equity in Eng., prays, y^e a writ of subpoena may issue to require y^e def's appearance, and answer. Mit 37.

This is no part of the Bill in Court. Process is annexed to, and issues with the Bill. to Def
It is in form a summons, or citation, to appear to def. leaving it optional with him (in where a discovery is prayed for) to appear and shew cause, or not. and is signed by some magistrate, or ordinary C Law process it.

all persons, who are concerned in the demand, or who may be affected by the relief prayed, ought to be made parties, if within y^e Jurisdiction. Pr Chy 83. 2 after 570. But if necessary parties are omitted or unnecessarily inserted, y^e It will in General permit y^e proper alterations to be made. Mit 39.

Practice in Eng. is to charge a combination of persons with others unknown to Plt^y, for y^e purpose of adding other names if necessary but this seems an unnecessary form. Mit 40. 21.

In Court when it is discovered that others ought to be added, as def^t y^e It will in General on motion, continue y^e cause, that they may be cited.

Whatever is essential to the Suit, and necessary within Plt^y's knowledge, sh^d be alleged positively and with certainty. as material facts at Law. sh^d be. Mit 40. 1. b. 56.

Seems as to facts charged, to rest in def's knowledge, or wh. if they exist, must be within his knowledge, and wh are the subject

of part of y discovery prayed - a precise allegation unnecessary in their case. Mit 41.

In many cases, it is necessary for the purpose of preventing an Evapor in failure of Justice yt the Ct shd make a Special order, or issue a provisional Writ, before y merits are decided.

As an Injunction to restrain def from
Mit 46- proceeding at Law. from committing waste.
afterwards dissolved or made perpetual.

23. In such cases, it is usual to insert in y Bill, before y prayer of process, or prayer for the Special order. So required, and then the Bill is commonly named from the order, or Writ so prayed. As an Injunction Bill &c. Mit 46.

Provisional Injunctions to stay proceedings at Law. not usual. I believe in Court. The Ct of Law will continue y Suit, as long as necessary on motion.

Every Bill in Eng is signed by Counsel and if it contain matter enominal, impertinent or scandalous, it shall be expunged and y Counsel must pay costs to the party aggrieved - But nothing relevant is considered scandalous.
Mit 47. 1 Ch R. 124. 2 Ves 24. Hinde 334.

Not so in Court.

23. Secondly, Bills of Interpleader - In these Plff claims no right, in opposition to any right claimed by Def.

This bill is the proper remedy of a person holding property or being subject to duty claimed adversely by two or more persons. he not knowing to whom of the Claimants, he ought

to award, it. Mit 33. 47. 125. Burnb. 303.
 1 Eqty Ct. 80. 2 Ibid 173. 1 Burr. 37.

Under these circumstances, he may exhibit a
 Bill of Interpleader vs the Claimants, praying
 that they may interplead, so that the Ct
 may judge, to whom he belongs, and yt
 he may be indemnified Mit 48. 2 Eqty Ct
 Ab. 137-

And if a Suit at Law is already commenced,
 vs him by either of the Claimants, he shd also
 pray yt y Pltf at Law. may be restrained
 from proceeding, till the right is determined.
 Mit 48.

The Pltf in the Bill must state his own
 rights, and their several claims, to show
 yt equitable interposition is necessary. Mit 48.

This Bill does not extend to ordinary cases 24.
 of Bailmt, as the parties in these cases
 may be compelled to interplead at Law.
 Mit 48m.

As the ground of the Suit is y danger of
 y Suit. is the danger of the Pltf being
 injured, the Ct won't permit y proceeding
 to be used collusively, to give an advantage
 to either Party. or to delay y payment of money
 due from the Pltf. Mit 48.

Therefore y Pltf must annex to y Bill Mit 49.
 an affidavit, that there is no collusion Burnb.
 and if money is due from him. he must bring 303.
 it into Ct., or at least offer. in his bill to do it.

3^d "Certeian Bill" praying a writ of ut name. to remove a cause from an Inferior equitable Jurisdiction - No Subpoena prayed, no appearance by def. no pleading beyond y Bill Mit 69. 50 The Bill states merely y proceedings below. y incompetency of y Ct. and prays y writ. Mit 49. Thus for y original Bill, praying Relief -

Of Original Bills not praying Relief - viz
 1st Bills to perpetuate y testimony of witnesses
 2^d Bills of Discovery.
 1st A Bill to perpetuate. It must state y matter, to wch all Testimony is to apply, and show yt Pltf has an Interest in the subject Mit 50. Knech B 391. 1 Root 379 It shd also show an interest in the def. to contest Pltf's Title, Secus no need of y Cui Mit 51.

It shd show that y facts, to wch y testimony will relate, cannot immediately be investigated in a Ct of Law. (as if Pltf is in the undisturbed possⁿ of y subject) or yt before an Investigation can be had. some material witness is likely to die, or depart the Realm. Mit 51. 131.
 1 B (M^m) 117. 3 Do. 77. 1 atk 450. Hinde 32.

The bill then prays leave to examine y witnesses, that their testimony may be preserved and perpetuated Mit 51.
 The deposition generally taken by commissioners appointed by Ct. for yt purpose. Hinde 32. 401. 2.

Secondly. a Bill of discovery - In Eng. every Bill requiring an answer, is a Bill for discovery, or at least prays a discovery. Mit 52.

But a bill distinguished by that title, is one
 not for a discovery of facts resting in the knowledge
 of the def. or of deeds, writings &c in his custody
 or power and seeking no relief. Ibid 32. Hinde
 36.

The Bill is commonly used in aid of a
 Jurisdiction of some other Ct. wh cannot compel
 a discovery, as to enable the Plt^f to prosecute
 or defend in a Suit at Law. Mit 52. 1 atk; 288.
 1 Ves 200. 2 Ves 457.

The Bill must state the subject of a discovery
 & interest of the Plt^f. and def in the Subject
 and the Plt^f right to a discovery. Mit 52.
 Hinde 36

When a Bill seeking a discovery of deeds, &c
 prays such a relief as might be obtained, at
 Law. if they were in Plt^fs possⁿ. he must
 answer an affidavit, that they are not in his
 custody, and that he knows not where &c.
 in in def^t hands. Mit 52. Hinde 36.7

Secus where discovery only is sought. 1 Vern 247.
 2 B. & W. 541. 3 atk; 132.

There is an Affidavit necessary in Court
 in the former case? I suppose not.

II Bills not original. viz. 1 Supplemental, 2^d
 of Revivor. 3 of Revivor and Settlement. Mit
 53. There are an addition to, or continuance of
 an Original Bill or both—

Remarks. A bill imperfect in its frame may
 generally be perfected by amendment. But where
 a state of the proceedings forbids an amendment.
 a new bill (not original) is necessary. Mit 53.

So a new Suit originally perfect may become defective by subsequent events. as by change of Interests. death of parties. In these cases a new Bill may be necessary. Mit 53.4. Hinde 42.3.

There if y Interest of a party in the subject of the suit becomes vested in another, pending the Suit, y Suit in its original form, generally becomes defective. Mit 55. Hinde 43.

And if such change of Interest is occasioned by the death of a party, whose Interest is not determined. by death, or by marriage of a female Pltff. y Suit becomes in part or whole discontinued. Mit 55. and if y party dying or a female marrying, is Pltff. y whole proceedings are in General discontinued. Ibid. 1 Eq. Ct. ab. 1. Hinde 46.

Upon the death of def also, all y proceedings abate, as to him and his Interests. But y marriage of a female def does not discontinue y proceedings Mit 55. 4 Vern. 147. 1 Vern. 318. 2 Ves 182. She a be named in the subsequent proceedings. But if the Interest of a party dying determines absolutely, so as no longer to affect the Suit, it does not abate. Mit 57. as Death of Tenant for life.

So if y Interest of y party dying survives to another. as one of 2 Exrs. So if husband die, being a Jo party with his wife, in her right. Mit 56. 2 Vern 249. 3 Atk 726.

So if on the death of her husband, (he and his wife being Pltff) she don't proceed in y cause, it will be considered as abated and

the not liable for y costs. Mit 57.

After a decree on a Bill of Interposition, ^{pleader} there is generally an end of y Suit, as to Pltff. ergo his death don't discontinue it - Mit 57. Item. 357.

It is a general Rule. yt if Pltff right in the subject of the Suit, is transmitted to another, pending the cause, y latter may supply defects in it if defective and continue it. if abated - Mit 58.

And if def^t. right in the subject. is transmitted y Pltff may perfect, or continue it vs y person. to whom. &c. Ibid -

30. The means of supplying defects, and continuing are. 5th by Supplemental Bills - When y imperfection of a Suit arises from a neglect in the original Bill, or y proceedings upon it and not from any subsequent event. it may be perfected by an addition in a Supplemental Bill - as further discovery prayed. new matter but in Issue. parties added. when y state of y proceedings will not allow of amendment. Mit 59. 3 atts. 375. 2 Ch R. 142.

And this may be done. as well after a decree as before Mit 59. 3 atts 138. 110. 217.

This bill is never allowed. where y end can be obtained by amendment. Mit 60.

This Bill also supplies defects occasioned by events subsequent. as by alteration in y interest of a Party or a new Suit Interest in one not a Party. Mit 60. 1 atts 291. 3 Do 217.

Of the Interest of a sole Pltf suing in "auter droit" determines by death &c and another becomes entitled to it, it may be added to, and continued by a Supplemental Bill. As death or removal of the assignee of a Bankrupt. Mit 61. 1 alk 88. 3 Do 218. Pr Chy 178. 2 Bern 237. 2 Ely C. abt. 3.4. For here y question of Title in the Pltf is not varied - y merits are y same.

But if a sole Pltf suing in his own right. is deprived of, or parts with his Interest in y Subject "pendente Lite" y benefit of y Suit cannot be obtained by Supplemental Bill, but by one in nature of. &c. as Pltf becomes Bankrupt. or sells his property. Mit 62. Com R 389. The reason. is that here y question of Pltf's Title, is varied. y merits different - ergo a new original Bill necessary. Mit 62.

So. if y whole Interest of a def is determined, and y subject vested in another, not claiming under, former. y benefit of the Suit not obtained by Supplemental Bill - as Tenant in Tail. Def. dies. and remainder vests. Supplemental Bill lies not vs a Remainder man but one in nature of &c. Mit 62. 7. 9. Reason. that Interest and Title are distinct - new merits - new Judgmt. matter. new party not bound by former acts.

Secus. if Def's Interest is not absolutely determined, but merely vested in another - as if he assigns. or devises. Here defects may be supplied and Suit continued by Supplemental Bill. For the purchaser is subject to y same Equity as Grantor, and Suits may not thus be defeated by def. Mit 63 - 1 alk 89. 89-

Mit 63.
4.
1 Root
759

2^d Bills of Revivor. Where a Suit is abated by death and the Interest of y deceased Party is transmitted to his representatives, as ascertained by Law. so yt y person only, and not the Title of the Representative, is to be ascertained by Chy. Suit continued by Bill of Revivor.

So if a Suit is abated by marriage of a female Pltff. Mit 64. The question of Title is y same as before.

3^d Bills of Revivor and Supplement. Of when a Suit is abated by Pltff death or otherwise, y rights of the parties are affected by any other event. (as by a disposition of y subject) a bill of Revivor and Supplement to bring y case properly before the Co. Mit 65. 6.

33. a.

Supplemental Bill not sufficient, because y Suit requires to be continued &c. revived, as well as added to. and a bill of Revor only is not sufficient, because y Suit requires addition, as well as Revival. The Bill under consider is a compound of Both. Mit 66. 74.

4th If y death of a Party, whose Interest is not determined, is attended with such a transmission of the Interest, yt Title to it, may be litigated in Chy. neither of y 3 former Bills will give y Claimant, y benefit of y Suit, but one in nature of a Bill of Revivor Mit 66. 88. As devise of Real Estate. Mosely 44. 1 Ch C. 528. 672. 2 Pers P. C. 529.

5th If y Interest of a Party wholly ceases, and y same subject vests in another, not claiming under him, neither of these Bills will answer, but one in nature of a Supplemental Bill.

Mit 67 62. 89 As Tenant in Tail dies, remainder vests, not bound by Tenant's acts. 2 Eq. Cr. ab. 3. 2. Br. P. C. 320. 435. Post.

Of the Structure of Bills, not original.

33. 1.

Supplemental. This must state y original Bill y proceedings upon it. and (if occasioned by any event subsequent) it must state y event. and y consequent alteration in the Suit. And in general, it prays in Eng (not in Court) generally, y t y def may appear and answer. Mit 69. 3 atk 217. Hinde 43. 1 Root 579.

If y event subsequent works an alteration in y Interest of y def, or of a person necessary to be made def, y Bill may be exhibited vs the person alone, with y other defs. and may pray a decree upon the Supplemental matter vs him alone. in y Interest of the other may be affected by it. Mit 70. 3 atk 217.

And where the bill is filed for y mere purpose of bringing new Parties before the Ct. as defs. y original defs. need never be made parties to it. Mit 70. 3 atk 217.

2^d Bill of Revivor This must state y original Bill, y proceedings upon it. and y abatement by death &c. and it must show a right to revive the cause, and pray, yt it may be revived. Mit 70. 3 atk 217. Hinde 48. 3 P. W. 348. 1 Root 579. And it may be necessary to pray an answer. Mit 70. 1. 2.

34

The object of y bill is to put y Suit in y situation in wh it stood at y time of y Abatement and

to enable y Pltff. to proceed in it. Mit 72. 3.

After a decree, Def in y original Suit, may file a Bill of Revivor, if y opposite party does not. For then y right of y Parties are ascertained and both are entitled to the Benefit of a decree Mit 73. Pr Chy. 197. 1 Eq C. 2. 3 atts 691. 2 Vern. 296.

In this case. The Bill merely substantiates y Suit. but it must bring before y Ct all y parties necessary for this purpose. Mit 73. 1 Eq C. Ab. 2.

A Suit abated may be revived as to part only y subject matter or as to part by one Bill, and as to the other, by another - as when y rights of the Pltff rest at his death, partly in his Real. partly in his personal Representative. Mit 75. 1 Eq C. Ab. 34. Hinde 48. com.

3^d. A Bill of Revivor and supplement, being merely a compound of 2 former kinds, is framed and proceeded with in its separate parts, according to those 2 respectively. Mit 74.

III Bills in y nature of Original are of 2 kinds, Mit 74. 1. Cross bills brot by def in a former Bill pending vs Pltff. or other parties touching y matter in question under y former. Mit 75. usually brot to obtain a discovery, or full relief to all Parties. Mit 75.

It may be brot by one or more def^s vs Pltff. and other Def^s. This is necessary, if a question arises between different def^s. for y purpose of bringing the whole merits before the Ct. together Mit 75.

It must state y original Bill, and proceedings upon it 36
and y rights of y Party exhibiting, i.e. y grounds
on wh it is founded. Mit 75. 6.

It beⁱ in y nature of a defence, or a proceeding
to procure a complete determination of y matter
in question already. Mit 76. 3 atk 812. Hard 160.

Thus when after issue joined, a new ground
of defence accrues. (as a Release) a Crossbill may
be necessary to take advice of it. Mit 76. 7. 3 Ch B 19.

So when a Suit in its original form. cannot settle
y rights of all y Parties, as where Co defts are in
opposite interests, a Crossbill by one or more of ym.
is y regular mode of bringing all y rights of all
y parties to a decision. Mit 77. 2 Ch. C. 248.
3 atk, 110. 1 Post 579.

2^d Bills of Review brot to procure an examination
and Reversal of a decree upon a former Bill,
signed and enrolled. Mit 78.

They may be brot upon Error apparent. upon y
decree. or upon y discovery of new matter - Mit 78.
1 Ch. C. 7 54. 1 Roll 382. Pr Chy 260. 2 P. M. 371.

When brot upon discovery of new matter, it 37
resembles in its object, and effect. an application
for a new Trial at Law. 1 Post 519 An appeal
to dom proc lies in such cases. in England.
Quere if the alleged error is apparent? Mit 79. 1 Bern. 416.

If on a Bill of Review, a decree has been
reversed, a new bill of y same kind may
be brot on the bill of Reversal Mit 79.
1 Bern. 417.

38.

In Eng. a Lapse of 20 yrs. from y time of passing y decree. is a Bar to y Bill, and after a demurrer has been allowed to one Bill of Review, a new one cannot be brought on the same ground.

Mit 73. 107. 1 Br. P. Ct. 33. 5 Do 33. 5 Do 33. 1 Bern 130. 417. 441. 2 Do. 120.

It is a Rule of y Ct in Eng yt the bringing of the bill shall not prevent the Est of y decree — and if money has been decreed to be paid, it is regularly to be paid before the Bill is filed — Mit 80. P. Ct. 240.

This Bill states y former Bill, y proceedings, y decree, y point in wh Pltf is aggrieved, and y Err. or new matter discovered. Mit 80. Ch. R 40. + Cues 414.

If y original decree has not been carried into Est it is sufficient to pray a Reversal. If it has. Pltf shd also pray. It be restored to the situation in wh. It was. Mit 80.

To render this Bill necessary, y decree must have been enrolled before. yt y proceedings are "in fieri" and y decree may be reversed by a Species of Supplemental Bill. Mit 81. 2 after 106. 3 after 811.

Of the Structure and of the Several kinds of Bills continued — 3^d of Bills in y nature of Bills of Review, brought by one not bound by a former decree. as where y decree was no person, having no Interest, or no such interest as shd make y decree binding upon another claiming the same or a similar Interest. Mit 34. 83. 1 Ch. Ct. 172.

As decree vs Tenant for life, affecting y right of Remainderman in Tail, or in fee. The latter may have this Bill. It must show the Error in the decree, y incompetency of y former party. (as Tenant for life, to sustain y Suit - his own Interest, and pray a Review and appearance and answer by the opposite Party. Mit 83.

4th So Impeach a decree for fraud. In this case, the Ct will restore y parties to their former situation. Mit 84. 2 PWR 83. 3 Ibid 111. 1 B. 2. 3 4/4.

It lies not only in cases of direct fraud, but in others having the same operation as where a decree is made. vs Trustee, y Cestui Que Trust not being a Party and y Trust not discovered, and in similar cases. Mit 84. 1 Ch C. 157. 3 Ch R 95.

So, it is said, when an an improper decree has been made vs an Infant. - Mit 85. 1 PWR 737. 2 Ber. 232.

40.

The bill must state y decree, and previous proceedings and the circumstances of fraud. &c. Mit 85.

5th So Suspend a decree under Special circumstances, or to void it for matter subsequent, as where after decree of Foreclosure. Mortgagee has been prevented by inevitable necessity, from paying at y day, y Ct may suspend it, and make a new decree upon the matter subsequent. - Mit 85. 6. 1 Ch C. 61. 255. 2 Ibid 8.

6th So carry a decree into Eff. Mit 85. Where from y suggestion of Parties, or other causes, benefit

cannot be obtained without a further decree.

This happens generally, where y Parties having neglected to enforce it their rights under it become so embarrassed, as to require a new decree to settle ym. and in some other case. Mit 80.

41.

2 Ch R 128. 2 Vern 400.

Thus it may be brot by one vs an assignee, to a party to y decree. Mit 80.7. 1 Ch Co. 231.
3 Br W 197. 4 Br P. C. 168.

The Ct generally only enforces, and don't vary y decree, and it is said. That y Law of a decree ought not be examined in Ans Bill. Mit 87. 2 Ver 232.
6 Br P. C. 395. 2 Jo 323. 1 Ver 218. 239.

7th In the nature of a Bill of Revivor. It is brot in certain cases, in wh. after abatement, a scribble bill of Revivor will not continue, y Suit. As where the Interest of a party dying is so transmitted, yt the Title may be litigated in Chy. as in case of a devise of the Estate. Want of Legal privity between them forbids a remedy by Bill of Revivor Mit 88.9.
On such case. the benefit of the original Suit is obtained by this Bill Mit 88. 66.
2 Vern. 584. 572. Pr Chy. 134. 2 Br P. C. 529.

It states y original Bill and proceedings in y Abatement, y transmission of the Interest, and y validity of y Pltfs Title. Mit 88.

42.

8th In the nature of a Supplemental Bill. But to obtain y benefit of a former Suit, when the Interest of y Pltff or def ends ^{fully} entirely ceases. and y subject is vested in another

not claiming under him - as Tenant for Life
 def dies. and Remainder vests. - Supplemental Bill
 lies not. - Nor of Revivor New Interests - new
 merits. new party. not bound by former acts.
 Mit 62. 67. 89.

It states y original Bill and proceedings upon it,
 The Ct wh determined the Interest of y former
 Party. and the Title of y Person, to whom transmitted.
 Mit 90. 2 Br P. C. 320.

Informations follow y nature of Bills, except
 in their Title. The subjectmatter is offered to y
 proper officer by way of Information, not of
 Petition. Mit 7. 21. 90.

1/ the nature of y Several kinds of defence - 43.

Defence is made by demurrer. Plea or answer.
 Mit 97. 13. and all these may be used, if
 they relate respectively to distinct parts of y Bill.
 Mit 13. 98.

I. of Demurrer. By demurrer, y def admits y
 matter of fact alleged, but demands Judgment
 as he shall be compelled to answer. Mit 14.
 97. 9. 3 P/Wm 80. 395.

The principal objects of a demurrer are to avoid
 a discovery - to aver a defective Title & to
 suppose to prevent an Investigation of it
 or to save Expence. Mit 100.

For any other purpose, it is of little use,
 for in General, if a demurrer wd hold,
 y Court wld not grant relief. The Def
 has answered. Mit 100. 3 P/Wm 150. 12. Mod 171.

44.

First. Of demurrer to original Bills - and under y^e head. 1st of demurrers to Relief. (wh frequently include demurrer to discovery)
 2^d To Discovery. wh sometimes consequentially affect the relief. Mit 104.

When the discovery sought is only assistant to y relief prayed. a demurrer to the Relief will extend to y discovery - But if y discovery has a further object. Plt^f may be entitled to it, tho he has no claim to Relief. Mit 103. 148. 11. 12.

1st of Demurrer to Relief - That y subject is not within the Jurisdiction of y Ct. is a good ground of demurrer - Mit 102.

Thus if the pl^tf has an adequate remedy at Law and y remedy is clear and certain, a demurrer will hold generally. Mit 111.

3 att^r 540. 3 Br. P. Ct. 525. 2 P. Wm 541. 1 ber 346.

45.

And when an affidavit annexed to the Bill, is necessary in Eng. to give Jurisdiction to the Ct. y want of it is good ground of demurrer. Mit 112. 26. 1 ber 346. 248.

Demurrer will hold. if Plt^f has adequate Remedy in any Ct of ordinary jurisdiction. as ecclesiastical in Eng. and Probate here. Mit 114.

On a great variety of other instances, y Jurisdiction may defeated (defective) and in all these regularly, a Demurrer will hold. Mit 116. 32.

So if another Ct of Equity has y proper Jurisdiction of y Suit, def may demur to y Jurisdiction. y Ct will dismiss it on hearing. So in Eng. in some cases. Mit 135.

Personal Disability - in pltf. (if apparent on 46
y Bill.) is a ground of demurrer. as Of Some Court
(in ordinary cases) over alone. Infant without
next friend. Idiot. De without Committee Mit 135.

But if y disability does not appear in the bill,
advice must be taken of it by plea. Mit 135.
This objection extends as well for (to) Bills of
discovery, as to those for relief. Mit 36.

That Pltf has no Interest in y subject, or no
title to institute the Suit, is a ground of
demurrer. As pltf claims under a will, from
y construction of wh. it is apparent, yt he has
no Title - - So tho' he may have an Interest.
but no right to sue. As one claiming under
foreign Letter of admⁿ. Mit 136. 2 Atk 210.
2 Ves. 247. Pr Chy. 589. 3 B. Wm 371. Amb. 25.
2 Ves. 35. Ray. 73.

This objection also extends to Bills for discovery. Mit
138. 1 Vern 103. 1 Eq. C. 234.

So that the Claim is unlawful, as to enforce. 47.
illegal contracts. This objection also extends as
well to a Bill for discovery, as for Relief. Mit
135. Finch 75. 1 Vern 5.

But if y Pltf states a complete Title, tho' a litigated
one, a demurrer will not hold, as for relief.
Mit 138. to y discovery, as admⁿ sue. Pending
a Suit, to repeal the admⁿ Mit 140. 1 Vern.
106. 3 P Wm 370.

Tho the Pltf has an Interest, and a right
to sue, yet for want of privity between him
and def. y latter may not be liable to y Suit.
Of so demurrer holds - as. a Legatee has no

has no right to call on Testator's debtors -
for the satisfaction of his Legacy. Mit 141. 2 atk 394.

So collusion between y Personal Representative and
y debtors, might afford a distinct ground, on
wh to claim relief. Mit 141.

248

Pltf must also show some claim of Interest in Def.
If as y latter may demur. Thus if in a bill to
set aside an award, or enforce one, y arbitrators
are made def. They may demur, and in general
not only to the Relief, but to y discovery. ~~in~~
Mit 142. 2 Eqty Cs. 78. 2 Bern 380. 1 Bern 180.

Tho it seems, if a Bill is brd to impeach
an award, for gross misconduct in arbitrators,
they may be made def. Mit 142. 2 atk 393.
504. 2 Ves 315. 17.

If a Bankrupt is made def in a bill w^o his
assignees, he may demur to the relief, having
no Interest. But, semble, if a discovery is
sought of his acts, before Bankruptcy, he must
answer to yt part, praying a discovery. Mit 141.

If by reason of any defect in the substance
of y case, as disclosed by the Bill, y Pltf is
not entitled to relief, y demur may demur.
Mit 144

49.

The want of proper parties is a satis ground
of demurrer. As one St Tenant Pltf, suob. Vining
alone for a legacy given to his wife. Mit 144.

Pr Chy 592. 1 Ch C. 41. Finch. 4. 113. 82.
202. 2 P Wm 311. 31. 2 atk, 67. 1 Do 290.

For it is y object of y Ct. to do complete Justice,
by settling y rights of all Persons, interested in
y Suit, for y safety of y parties, and to prevent
Litigation Mit 144.

But a part of y creditors to the estate of a deceased
person, may sustain a Bill in behalf of themselves,
and y rest, for an account of the Estate and
paymt. But in this case, the others may come
in under y decree. Mit 145. 2 Ves 312. Pr Chy.
392.

If a satis reason for omitting a necessary
party, is suggested by the Bill, a demurrer
will not hold. As If he is resident out of
y Jurisdiction of y Ct. Mit 146. Pr Chy 83.
2 after 370.

So if y Bill seeks a discovery of y necessary
parties. Mit 146. 1 Vern 30. 50.

A demurrer for want of Parties, must show, who
y proper parties are. - not indeed by name -
for this might be impossible, but by some sort
of description Mit 146.

Amenamt has been allowed after Judgment
upon Demurrer, for want of Parties Mit
146. 2 Ch. C. 197.

That y Bill demands several matters of different
natures, so several defs is sufficient cause of
demurrer. - Tends to burthen each def. with unnecessary
costs. - some of ym being strangers to a part of y
claim. Mit 146. 7. 1 Vern 416. 463. Hard 337.

So if y Bill relate to only a part of y
controversy between y Parties, to prevent multiplicity
of Suits. Mit 148.

57. 2 Demonstr. to Discovery In a bill praying relief, as well as a discovery, y latter being merely in aid of the former, is in general incident to it - So the demonstr to y Relief, extends to y discovery also. Mit 148.

But as discovery is sometimes sought without Relief, it may be, yt Pltff in a Bill praying Relief, may show a Title to discovery, tho not to relief, in wh case, a demonstr may hold to the Relief, and not as to y discovery and vice versa. Mit 148.

When the Bill prays Relief, y discovery if material to the Relief, includes a right to y discovery, unless something in differt situation, render it improper. Mit 149.

But in a bill bitt for discovery merely, or becoming so. Pltff must show, a case in wh y it ought to interpose for y mere purpose of compelling a discovery. Mit 150.

52. Generally used in aid of y Jurisdiction of another Court, to enable Pltff to prosecute or defend. But if y proceeding in another Ct. is not purely civil, a demonstr to the Bill will hold. As Jurisdiction or Information, in B R. Mit 150. 2 ibes 338.

So if y Ct of ordinary Jurisdiction, in wh y Suit is pending, can itself compel a discovery. Mit 150. 1 atk 238. 1 ibes 205. 2 Jo 457. As action of account in Court.

That Pltff has no Interest in the Subject, or not such as to entitle him to a discovery from Def.

is satisfactory ground of demurrer - as Bill prays a discovery to be used in a Suit to be brōt at Com Law. but states a case in wh it is clear. action at Law. will not lie. Mit 157. 222. Finch 36. 440.

33.

That def has no Interest, nor claim to y subject, is good ground of demurrer. Mit 152. 2 Vern 380. 2 atty 394. 1 Ver 426. 3 P/Mi 314-311 The fact is ev^d but y answer of a party not in Interest, ^{seem} cannot be read vs him in Interest. - (see Jackson) & seem \$ reckon.

Want of Priority of Title between Plt and def. is a ground of demurrer. Mit 154. As Legatee, among Testamentary creditors -

That y discovery is sought is not material is a ground of demurrer. As If he does not show. That y discovery wd apply to his case. If he don't show a Suit pending - or a cause of Litigation Mit 154. Finch 214. 2 Ver 396. 9. 2 atty 388. 1 Vern. 204.

But in general, if it can be supposed, yt y discovery may be in any way material to it. i.e. y support or defence of a Suit. it will be compelled. Mit 156. 1 Ver 205.

The situation of def may be a ground of demurrer. as if the discovery may subject him to a Penalty. or forfeiture - or hazard. a ~~recovery~~ title, equal in Equity to Plt's. tho' not perfect at Law. Mit 157. 162. 2 Ver 245. 1 Eqty G. abt. 131. As If called upon to decree a honourable contract. Mit 157. 2 Ver. 246. 2 Do 451. 1 atty 450. 2 Do 393. Finch 75. 3 P/Mi 376 -

But if Pltff alone is entitled to y Penalty, and expressly waives it in his Bill, Def is compelled to make discovery Mit 158.

1 Ver 60. So if def by his own agreement is bound, to a payment in nature of a Penalty, in the event of his doing a certain act. Mit 159. And if Def has covenanted not to plead, or demur to the discovery, he is bound by it, penalties notwithstanding Mit 158. 1 Cy C. Ab. 77.

So def is not bound to make a discovery, wh may tend to show him guilty of any moral turpitude - as the birth of a Bastard Child - Mit 160. 2 Ver. 457.

Nor when the discovery may subject him to a forfeiture of Interest. as whether a case has been assigned witht licence Mit 160. 1 Ver 58. 2 atts 392. 2 Ver. 265. 1 Cy C. 131.

Secus if Pltff alone is entitled to y forfeiture, and waives it by Bill - Mit 161. 1 Ver 58. 2 atts 393.

Def not bound to make discovery, wh would subject him to any thing in y nature of a forfeiture as In Eng. an he was educated a Papist - Mit 161. 3 atts 457.

If def has an equitable Title, equal to Pltff's. tho not perfect at Law. he ant bound to discover y defect in in it. If y fact so appears in the Bill, Demurrer will hold. Mit 161. 2 Ver 450.

On a Bill for discovery merely, some grounds of demurrer, wh would extend as well to discovery, as a relief in a Bill praying relief, will not hold. Thus demurrer for want of Parties will

not hold to Bill praying discovery only - for it seeks no decree, nor in General for want of Equity in the case. for same reason. - Not because y bill extends y discovery sought to part of y controversy only. Mit 163.

Second. Demurrer to Bills not original and 58.
Bills in the nature of Original -

Many of y Rules given under y former General decision, will apply to ys. Mit 163.4.

If a Supplemental Bill is lodg, where y original might be perfected by amendmt. Demurrer will hold. Mit 164. 3 after 817.

Demurrer to a Crossbill will not hold, for want of Equity, for Pltff is lodg in Chs. by the original Pltff, and a crossbill is generally a mode of defence. Mit 165. Hard 160.
3 after 812.

Any irregularity in the frame of a Bill of any Sort, is a ground of demurrer. Mit 168. 3 after 802
Barrb. 56.

Demurrers are signed by counsel, but in without oath. - as they assert no fact. Mit 170 -

If def answers to any part of a Bill, to wh he has demurred, he waives the benefit of y demurrer, so if he pleads de. For the demurrer demands Indgmt. an Def shall answer, and to y answer is Plea.

Pltff may reply and adduce testimony and thus proceed to a hearing. Mit 171. 3 D/P 179.
2 after 157. 282.

Regularly after a demurrer to y whole Bill has been allowed. there can be no amendmt. Mit 174.

But after demurrer allowed, to part of y Bill

y whole may be amended. for y suit. here continues in Court. Mit 174.

A demurrer upon matter of form, tho allowed, is no bar to a new Bill. Seem if y merits have been decided upon it. Mit 174. 2 Ch. C. 133. 1 Rem 135. 441. 2 Do 120.

When y bill itself don't disclose y whole of a case. wh if fully disclosed. wd support a demurrer. Def must resort to "Plea. in wh he may allege. what Pltff has omitted. Mit 175.8.

58. For in many cases. what constitutes a good defense by way of Plea. wd be a good ground of demurrer. if it appeared in the Bill Mit 175. 3 alms 226.

II of Pleas. First to original Bills. Secondly to other Bills. Mit 176.

First to original Bills. There are of 2 kinds
1. Pleas to Relief. 2 To Discovery. Ibid.

1. to Relief. When the objection to the suit is not apparent. on the Bill, y Def must. if he wd take advantage of it. show to y Ct. by Plea or answer. Special matter. wh creates y objection. Mit 177.

A Plea is a sort of Special answer. resting y defense upon some one point. The defence. then. wh is proper for a Plea. must be such as reduces y controversy or a part of it. to a single point. - If it depends upon a variety of circumstances, or several distinct grounds. it shd be made by way of answer.

Mit 177. 234. Hinde 170. 1 alms 54. In Court. y hearing in either case. is frequently at large. i.e. without plea or answer.

Pleas of 3 Sorts - 1st For the Jurisdiction,
2^d To the Person of y Plt. or def 3^d In Bar of y
Suit. Mit 177. 8.

The objections wh may be made, by Plea. to y
relief prayed, are nearly tho not precisely y same,
as those wh are subjects of demurrer, when the
ground of objection is apparent on the face of y
Bill. Mit 171.

The principal defences proper to be made by
Plea. are y following -

1st That y subject of y Suit is not within y
Jurisdiction of y Ct. (i.e any Ct.) of Equity - y
is called a Plea., not to the Jurisdiction, but in
Bar, because it does not deny the particular
cognizance of the Particular Ct. (of Equity) applied
to, but the principles of Equity extend to y case,
Mit 178. 180. It goes to y merits -

Quere. That some other Ct of Equity has the
proper Jurisdiction - y is a Plea to y Jurisdiction.
Mit 178. 2. 182. 1 Vern. 203. 1 Vern 59. 212.

3^d That Plt is disabled to sue by reason of
Personal disability - as Outlawry - Alienage. Attainder -
Mit 178. 185. 1 Vern 184. Co Litt 134. 2 att. 399.
1 Bria 57. This is called a Plea. in y nature
of a Plea in abatement Mit 179.

4th That Plt ant y Person. he pretends to be,
or does not sustain y character, wh he assumes,
as that he is not Est Mit 178. 188. 1 Vern 473.
This is called a Plea in Bar. Bria.

5th That Plt has no Interest in the subject.
Tria This also is a Plea. in Bar. Bria 3 att. 399.
It extends as well to discovery as to relief Mit 181.

6.th That def. is not liable to be called upon, touching y subject in Question: as where there is a want of proximity of Title, between Plff and def. This is a Plea in Bar also. Mit 179. 192.

61. 7.th That def. is not the person, he is alleged to be, or dont sustain y character, in wch he is sued. Mit 192. This is a plea to y person of y Def. Ibid 179.

8.th That def. has not such an Interest, in the subject, as to render him liable to Plff's demand. Plea in Bar. Mit 193. Bern 426. But generally in such cases, a disclaimer is proper. Ibid 193.

9.th That for some reason founded on the substance of y case, Plff is not entitled to the Relief prayed. A Plea in Bar. Mit 179. 194. As a former decree or order of y Court, by wh the rights of y parties are determined. 3 alth 626.

62. Or that another Bill for y same cause has been dismissed Mit 194. 1 Bern 310.

But the decree or order pleaded, must be a final one, or it is no Bar. Mit 195. 2 Ber 450. and so much of y former proceedings must be set forth, as to show, that y same point was then in Issue. Mit 195. 2 alth 603. 2 Ber 577.

An order dismissing the former Bill for some cause can be pleaded in Bar, only where the Ct has determined, that Plff had no Title to relief prayed. Of course the dismissal for want of prop^r is no Bar. Mit 196. 1 alth 571. 1 Bern. 310. 1 Bro PC 281.

44.4.

So a decree of another Ct. of Equity determining
y rights in Question, is a good Plea in Bar.
Mit 197. 3 Br. P. C. 584.

So another Suit pending in y same or another
Ct of Equity for y same cause. is a good plea,
under y head. Mit 197. 3 atk 587. 590.

Not necessary. That the former Suit be between 63.
precisely y same parties, as the latter - as a Pltff
sells part of y property, pending the Suit - to
B. who sues for his part. Plea of y first Suit
pending, will hold. Mit 199. 1 Eq. C. 41. 39.

So where one part owner of a Ship, files a Bill
vs y Captain for an account. and all y owners
join in a new Bill - But in case of this kind,
practice is. to dismiss the first, and to direct
def to answer to the Second. on costs paid.
Mit 199. 1 Ch. C. 241.

But when a second Bill is brot by the same
person. for y same purpose. but in a different
right, the pendency of the first Suit, is not a
good Plea. as one sues as Exr. when he is not
Exr. then takes out admⁿ and sues as admⁿ
Mit 179. 2 atk 44.

If Pltff has a Suit pending vs Def for same
cause at C Law. Def after answer but in,
may by application to the Ct. counsel Pltff to
elect in wh Ct. to proceed. but the pendency
of the Suit at Law. is not pleadable in Bar
(formerly Contra) Mit 200. 3 P Mⁿ 90.

But the Indgmt of a Ct of ordinary Jurisdiction

determining y rights of y Parties, is in General a good Plea. & in Bar of a Bill in Equity, for same cause. Mit 204. 1 Vern 397. 2 Vern 876. 1 P Wm 389. 2 Ibrd 286.

Plea of an account stated, is good in Bar of a bill for an account, but it must show y balance. Mit 208. 1 Vern 180. 2 Atk 1. 3 Do 303.

A Release may be pleaded in Bar of a Bill at Law. but it is said. That a plea of Release, must state y consideration, upon wh it is founded or made. rather. Mit 209. 3 P Wm 315. 2 Ber 108. Hard 168. 3 Br P. C. 366.

The St of hands in many instances, St of Lim^d and other Sts may be pleaded in Bar, as well in Chy as at Law. Mit 210. 14. 2 Atk, 155. Pr Chy 402. 533. 1 P Wm 770. 3 P Wm 309. 2 Atk, 295.

The Def has a high claim to y protection of a Ct. of Equity to defend his possⁿ as Plt^f has to assert his Title, is a good Plea in Bar. as purchased of Trustee without notice of the Trust Mit 215. 2 Atk, 397. 630. 2 Bent 361. 2 P Wm 281. 1 Vern 246.

The insufficiency of y Bill to answer y purpose of complete Justice, may be objected to by Plea. y objection is founded usually on y want of proper parties. Mit 220. 1 Vern. 110. 2 Atk, 51.

2^d of Pleas of discovery only. 1st That y case is not such. as to entitle the Ct of Equity to assume a Jurisdiction to compel discovery - Mit 222.

2^d That Plt^y has no Interest, or not such as entitles him to discovery, if that fact appears demurrer will hold - Mit 222. Is Plea. yt Plt^y suing as heir or Ex is not heir &c.

3^d If def has no interest in the subject, (tho an Interest in him is alleged in the Bill) he may protect himself by pleading the fact, or by disclaimer Mit 223. 1 Ves 420.

4. If the situation of def renders it improper, for Equity to compel a discovery, he may avoid a discovery by Plea. Mit 223. 2 Ves 243. 1 Vern 109. If the fact is apparent in the Bill, he may demur. Mit 137. Secus he must plead.

The cases in wh this Plea is proper, are. 1st 67. where the discovery may subject him to Punishment of any kind. If then the discovery sought, tends to prove a crime upon def. he is not bound to answer, and if y fact is not apparent, he sh^d plead it. Mit 224. 157. 1 Vern 110. 2 Ves 240. &c.

Bill for discovery of a marriage, wh if discovered wd prove def guilty of Incest or Bigamy. 3 Br P C. 65. 3 P Wm 375. 1 Atk 33

2^d Where y discovery tends to subject Def to a forfeiture of Interest. as Tenant for life charged with waste. Mit 160. 226. 1 Atk 326. 8. 1 Eq C. ab 77. 2 Ves. 389. If it so appear in the Bill demurrer will hold. Mit 160.

But def in such case, is protected vs the discovery of no other fact. ym yt wh wd occasion the forfeiture - Ergo. in the last instance, plea wd not hold, as to the facts. of def. being Tenant for life. but as to y waste only. 2 Ves 109. Mit 226.

68.

And in cases of forfeiture, if Pltf alone is entitled to the benefit of it, and waives it by his Bill, Def is bound to make the discovery. Mit 227. Mosely 75.

3^d If y discovery sought is a fact, y knowledge of wh. Def acquired from y confidence reposed in him, as Counsel. Atty. or arbitrator he may avoid a discovery. by pleading, that his knowledge was so obtained. Mit 227. 8. 1 Ch. C. 277.

4th That def is a purchaser for valuable considⁿ without notice of Pltf's title, is a good Plea to avoid a discovery of his Title - as purchase under Mortgagee, y defeasance being separate -

Purchase of goods of a Bankrupt, before y commission and before notice of the Bankruptcy. Mit 288. 162. 1 Vern 27. 2 Ves 450.

69.

Certain Bills admit of no Plea. Mit 49. 228.

Secondly, Pleas to Bills, other ym original -

Many of the Pleas to Bills already ^{enumerated} commenced, will hold to the other kinds of Bills, according to their respective natures, and some of y latter admit of Pleas. wh do not hold to original Bills. Mit 228.

If a Bill of Review is brot without sufficient cause and this is not apparent. def may show it by Plea. So if y Pltf is not y proper party. Mit 228. 3 P. M. 348.

So if a Supplemental Bill is brot upon matter, wh arose before the original Bill filed and is not apparent, Def may plead it. Mit 222. 230.

A crossbill is not liable to any Plea. wh 70.
 nor hold to any original Bill - in nature
 of an original Bill Mit 230.

And it is not liable to Pleas to the Jurisdiction,
 of the Court. nor to Pleas to person of Pltf.
 exhibited in y name of some def alone.
 who cannot sue alone. As Infant. Some Court.
 Idiot. Lunatic. For Pltf in the original Bill
 has submitted to the Jurisdiction of y Ct. and
 obliged the def to defend. Mit 230.

In pleading. There must be generally y same
 strictness as to substance, as least in Equity. as
 at Law. Mit 232. 3 alms 70. Morely 40. 40.
 2 ves 108.

It seems that a Plea ought not to contain
 more. ym one defence. Double plea. informal, 71.
 and improper. Mit 233. 4. 5. 1 P M 575.
 3 alms 341.

But a Plea may be allowed in part and overruled in
 part. IC. it may be allowed as to part of y Bill
 averred by it. and overruled as to the rest. Mit
 2325. 1 alms 53. 2 Gira 44. 155. 284. 3 Id 589.
 1 ves 285. Pecus of demurrer. 2 alms 284.

The averment ought in general to be positive as at Law.
 exception in certain cases. As That an account
 pleaded is just. according to the best of his
 knowledge. and belief. So in case of negative
 averments. and averments of facts. not within his
 knowledge. immediately Mit 235. 6. 3 alms 80.

All material facts must be clearly and distinctly
 averred. Mit 236. Gild Ch. 58.
 Gild

If y Bill contains any charge, wh being unavered would defeat y effect of the Special matter alledged. in the Plea, y charge must be denied not only by the Plea, but by answer also. In this case the answer is used, merely to support the Plea. It is not a General answer constituting a distinct defence. Mit 236. 9. 242. 3 alk 304. 810. 3 P M 140. 3 Br P. C. 373. 2 alk 241. Not required in Court practice—

But if the Plea is accompanied by answer to any part of the Bill, averred by the Plea, (IE to any part of wh y Plea is in avoidance) it overrules y Plea. Mit 237. 254. 2 alk 155. 2 Br P. C. 20.

73.

Or if neither party wishes to try its sufficiency in the first instance, Plt may take Issue upon it, with a decision upon its sufficiency—Mit 240.

{ As to the effect of allowing a Plea simply, allowance reserving the benefit of it to the hearing, and ordering it to stand for an answer, see Mit 239. 243.

Plt by replying to a Plea, admits its sufficiency. If therefore he takes issue upon it, and def proves it true, y Suit so far as the plea extends, is bound, tho' the Plea itself is not good. Mit 240. 3 Br Par. Cases. 74. 3 P M 94.

74.

Of Answers and Disclaimers—

1 alk

450.

If a plea is overruled, def may insist on y same matter by way of answer. Mit 244. 3 P M 95. 2 ves 492

And whatever part of y Bill is not covered by Demurrer or Plea. must be defended by answer. in def disclaiming Mit 244.

The Plt in y Bill is entitled to a discovery by def. in he can avoid it by some mode of defence. and if he don't protect himself by Demurrer or Plea. he may still in his answer insist. That he isn't bound to make discovery Mit 244. 3 P M 338. 2 Ves 491. 3 alk 276.

In this case. Plt may except to the answer. as insufficient and upon y's exception. it will be determined, an y def is bound to discover. answer. or not. Mit 445.

If Several distinct grounds of defence, wh go in Bar exist, Def shd state them by way of answer instead of Plea. and may have the same advantage of you. as if pleaded in Bar. Mit 245. 6. 1 atty 54. 2 P M 145.

For so much of y Bill, as is material, def must answer directly, he must confess or deny y substance of each charge. Mit 246. 6. 7.

Particular and precise charges be answered particularly - not generally. Mit 247. 2 Cy C. 11. 67.

If y answer. states any thing not material. to the def's case. it will on application to y Ct. be expunged. - So of any thing scandalous. but nothing relevant is deemed scandalous. Mit 248. Morely 45. 70. Hinde 254.

The answer usually begins with a Reservation of all exceptions, to the Bill. It then gives particular

answers to y Several charges, consisting of a denial of ym. or a confession of ym. with new matters by way of avoidance or Title. Mit 248.

It concludes with a General denial of all other matters contained in the Bill. This is unnecessary and absurd. if y whole is before answered. as is usual. Mit 249. 3 P.M. 87.

When def is an Infant, y answer is expressed to be by his Guardian. In this case. the reservation of Exceptions to the Bill and y General Traverse. at y conclusion, are omitted. for he is entitled to the benefit of every exception, of course. and y answer cannot be excepted to. for Insufficiency Mit 250.

77. The answer of a Lunatic or Idiot. is expressed to be by his Committee, or by the person appointed his Guardian. by the Ct. Mit 250.

Answers are signed by Counsel. or when taken by Commissioners Mit 250.

If Plt. supposes the answer to be insufficient, (i.e. not full and explicit) he may except to it. stating such parts of y Bill, as he conceives are not answered. and praying that def. may. as to those parts. make a full answer. Mit 250.

A further answer in this case is considered as part of y first and an answer to an amended Bill. as part of y answer to y original Bill. Mit 252. 3 alts. 303.

78. Def may disclaim all right and Title to y subject or to any part of it. But a disclaimer can be hardly

be moved with an answer. For a disclaimer is only a denial of present interests. But def may have had an interest, and disposed of it, and an answer is generally necessary so far as to ascertain the fact. Mit 253.

The form of a disclaimer is, yt def disclaims all right and title to the subject demanded. Mit 253.

A disclaimer admits of no Reply and y Ct. will in General on disclaimer made, dismiss y bill with costs. Mit 254. 3 alks 580.

Def may demur to one part of y Bill, plead to another, answer to another, and disclaim as to a nother. But these must respectively refer to different and distinct parts of y Bill. For he cannot plead to what he has demurred to, nor answer any part to wh. he has demurred, or pleaded, y demurres praying Judgment, on he shall make any answer, and the Plea, on he shall make any other answer. Nor can he claim by answer, what he has once disclaimed. Mit 254. 2 Br P.C. 20.

79.

A Plea or answer then, overrules a demur, and an answer, a plea. Mit 254.

Replications. A replication is pltf's reply to def's plea or answer. Mit 255.

Formerly it was usual, for Pltf to reply specially, to special matter alleged in the y plea or answer: unless he thought it advisable to deny the plea, or answer generally. Mit 255.

The consequence of this practice, was frequently a long train of Special Pleadings, wh was found

inconvenient in Chy Proceedings - Mit 255.
Hinde 284.

The practice is now altered. Special Replication
are out of use. and Pltf is to be relieved
according to y form of the Bill, whatever new
matter. def may have alleaged. Mit 256.
Hinde 284. 1 Root. 581.

And if Pltf conceives yt from any new matter,
offered by his def, his bill is not properly
adopted to his case. he may amend it, and
to the bill thus amended. Def may make
new defence. Mit 256.7 Hinde 285.

The General Replication now in use. is yt.
Pltfs bill is true, certain and sufficient.
and the plea. &c. is untrue, uncertain. and
insufficient Hinde 285.

If Pltf does not reply at all. y Plea or
answer. is taken to be true. Hinde 283.

Public wrongs.

Persons capable of committing crimes

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532.

Public Wrongs -

457.

That branch of Municipal Law, which deals with Public Wrongs, is called Criminal Law. Hence the term or Crown Law. 4 B.C. 2.

The term "Public Wrongs" ^{includes} all crimes and misdemeanors, or in other words all offences vs the Municipal Law.

A crime or misdemeanor is an act committed or omitted in violation of a public law forbidding or commanding it. 4 B.C. 2. 5.

Crimes and Misdemeanors are strictly synonymous, though in common acceptance, the former denotes offences of a more atrocious kind, & latter those of a less heinous nature. 4 B.C. 5.

A crime of any kind is a violation of a Public right, inherent in the whole community, or in short an injury to the whole community, or State. A civil wrong on the other hand is a violation of a Private right. It is true however that in almost every case a Public wrong actually includes in it a civil injury. Yet the Public offence is one thing and the civil injury another. As Battery, Theft, Murder, Robbery, &c. in every case it involves or includes such injury, as a Public Nuisance. 4 B.C. 5. 51.

When a wrongful act involves this civil injury it is the object of the Law to afford to afford so far as is possible a twofold ~~reparation~~ reparation. One to the Public, the other to the Individual. 4 B.C. 7. 5. 6.

Yet if the offence amounts to Treason, the private injury is regularly at Law merged in the Public offence, and no private reparation can be had. As Treason, Murder, Robbery, Larceny. 4 B.C. 5. 6. 2 Roll 337.

C. S. C. 10. 1. Mod. 283. 5 Com 332. Bull 191. Master
and Tenant 7. 181.

The doctrine of Merger has been said to be founded on
the policy of a Law, & object of wh is to prevent
offenders from escaping from punishment &c. to prevent
a combination of crimes 3. 5. 6. 170. arguendo

* "Vide Infra"

But the only true and rational foundation of the
doctrine seems to be at the punishment of a public
1572. wrong renders it impossible for the offender to make
2. a Pay a reparation for the ~~public~~ ^{civil} injury, it being in General
a forfeiture of both life and property and has relation
4. 5. 6. 176. 7. arg. back to a time & offence was committed. At 1800.

On the other hand if a crime not amounting to felony,
injures an Individual, he has his remedy as Battery
Libel. Nuisance. for here the punishment being less
there leaves room for private compensation. 4 R. 6.

On Point this doctrine of Merger seems not to have
been regarded. Civil Suits have been sustained for
perjury & arson. Good Tell vs French. Ransom vs Hunt.
Forfeiture of property for crime obtains here only in
2 cases. viz destroying Magazines & the S. in time of peace.
In manslaughter. At 182. S. O. 280. and in neither
case is life forfeited.

My action vs party to former Suit for subornation
of perjury. Bostwick vs Lewis. Et of Error. Subsequent
Sue in Tol to the same point, for it being between
the same parties had impleaded the former Judgment.

Decl^r states that a by subornation he obtained Judgment
or such Judgment. But that he was a Witness for the
record is no Pri but between the parties.

The right of punishing for crimes, is founded on
the Law of nature & in some instances, is authorized

by the Revealed Law of God also. as in the case of Murder. This right in a state of nature was vested in every Individual, for it must have existed somewhere. otherwise ^{v. 9^e} no Ex^t of y^t Law. ^{v. 9^e} Its Sanction 4 B.B. 7.

In a State of Society this right is transferred to the Sovereign power, and Men are no longer their Judges and Assessors.

Society's right to punish is said to be derived from the consent of its members, express or implied, and therefore is founded on Contract. 4 Bl. 8.

This foundation is broad enough to authorize many most punishments, but not at all, as Capital punishment, for things which are merely "thala prohibited". Original compact can't confer a right to inflict Capital punishment in such cases. Secs as to offenses which are "thala vi see" for an individual who had a right to punish in a state of Nature, has a right to transfer it. 4 B. & G. vaster 74. Paley 341.

2 Burlamaqui. 142.

Consent of y Criminal is in no case satis to authorize
Capital punishment & B.C.G.

But the most rational ground of right, not only in
"Mala prohibita" but of all offences, is necessity or
Emergency. A Sovereign State, tho' regarded as a moral
person, has attributes different from those of a physical
Individual, different right, diff't duties, different nature
and Powers.

The end of human punishment is the prevention of crime and at this day its well settled, that it has nothing to do with vindictive punishment. This end is to be attained in one of 3 ways.

First By reforming offenders.

Id by depriving of the power of doing future mischief - 343.

Thurs. By deterring others from offending & 3C 11. 12. Paley. 434.

Ideals and Lunatics are not punishable for their
 then acts while under these incapacities. 4 B. 24.
 3 B. 20. 1. Hale 16. 43. 2. 1. Parkers 2.

Ideals or a Lunatic who signs in a Liquid interval.
 4 B. 25. 1. Hale 3.

A person deaf and dumb from nativity may be tried and
 punished even for a capital crime. If ideas can be conveyed
 to him by signs. Leach 1683. 4. 2 B. 31. 2 Hale 3.

2 Hawkins 202. 4 B. 324. 1. M. n 158. 1. Mc Nally 59.

If one commits a capital offence and before arraignment
 become insane, he can't be arraigned, if after arraignment
 and before trial, he can't be tried - if after verdict,
^{before} Judgment - no Judgment - if after Judgment; no
 Exec. 1. Hawkins 2. 13 B. 46. 1. Hale 16. 34 37. 4 B. 24. 395.

If it be doubtful an the prisoner is non compos, the
 fact must be tried by the Jury. 4 B. 25.

He who incites a Thugman to do an unbecoming act, is
 himself the offender, or the Principality. 1. Hawk 23. 800. 1. Hale 37.
 4 B. 35. Leeling 33.

Voluntary Intoxication is no Excuse, rather an aggravation.
 1 Hale 32. Co Litt 242. 4 B. 25. 6. 1. Hawk 23.

Habitual debility of mind produced by a long course
 of Intoxication, seems to presume.

So if the intoxⁿ is involuntarily produced by force
 or fraud. I presume.

II. There is a defect of will, where a understanding
 his value, and wastes. Here the Will is Neutral.

General rule, yet if one commits an unlawful

are by mistake & chance & is excused, and is a
 subject of law. Keeling 123. 1 Co 126.

But if one who voluntarily does an unlawful act, long
 unattended, involving, he is excused.

1 Pale 39. 4 Bl 27

Insurance, insurance is made in many cases, for
 in such cases, there is a duty of care. There is a master
 in point of law for in the latter case the will concurs
 with the act.

3 Bl 574. Ray 46/8. 1 Burr 35

1 Hawkins 516 Cro 6 Cro 538.

Amputation. ¶ II. There is a defect of will arising from compulsion,
 or necessity. Here the will is gone, the mind is not
 least don't approve it. 36. L. 7. 8. In the legislation
 enact, an intention law commanding an act causes
 a passion, or morality. The party is excused in acting
 for he acts under the obligation of his conscience.
 36. L. 7. 8.

Some
 cases.

A female is in many instances excused from punishment
 when she does an unlawful act thro' the coercion of her husband
 or when she is in his company, in theft and
 burglary. Keeling 31. 7. 10 Mod 63. 4. Bl 28.

But if she commits these crimes voluntarily or by the
 command of her husband, she is not excused.

Ant Theft and Burglary made in L. 9.

In case of treason murder & as said before, even
 coercion by the husband, don't excuse her.

So in Manslaughter.

Child and
 servant.

Neither child nor servant is as such excused for any
 crime.

crime done by the command of the Parent or master,

1. Hankin 3.5.3 Blk 34. 4 Bl 28.9. 1. Hale 44.

Another species of compulsion working a defect of will, is duress per minas. This excuses many unnatural acts. As Inevitable acts would be commission of the Crime. Jansel or Rebels.

But this last excuse holds chiefly in relation to positive offences, only and not as to natural offences.

As Killing an innocent person to escape death. 4 Bl 30. 1. Hale 51.

1. Hawk 5. 4 Bl 730. 1. Hale 50.

Another kind of necessity arises from legal compulsion. Legal in which case the will is passive, as when an officer of Law is bound to make an arrest, or disperse rioters. If resistance is made, killing is justified.

4 Bl 31. 1. Hale 52.

Feeling to relieve extreme want of food or clothing, and justified by the Law 4 Bl 31. 1. Hale 54.

Principals and Accessories.

Principals
&
Accessories

He may be a principal in an offence in one of 2 degrees.

1. Principal in the first degree is one who is the absolute perpetrator, and in the 2^d he who is an aider and abettor. The absolute perpetrator. Hale 43. 4 Bl 300.

2. The Mally 523.27.8. 4 Bl 34. Doug 197. 1. Hale 615. How 97. Accessories in the first degree in the last case are principals in the first degree. 2. Hawk 258. 300. 441. 2. Hale

The latter were formerly considered as accessories only.

The presence necessary to make a Principal in the 2^d degree need not be actual standing by within sight, or hearing - constructive presence is sufficient. See how much at a convenient distance. 4 Bl 34. Foster C. L. 358.

Doug 197. The Mally. 539.

to aid and assist a person in crime will make a Principal in felony.

The above Rules hold in case of Treason & Felony.

2. The Mole 525.

Even a constructive presence and always necessary to make a Principal in the first degree. As preparing dinner, and taking it in offence, absence. The sp. Pet, all setting out wild Beasts, with intent to do mischief. Here the offender is Principal in the first degree. Foster 349. 2 Hawk 443. 4 Bl 345. Keeling 52.

A Special verdict finding only if the business was present, and later, to warrant a Judgment as here.

Accessory. An Accessory is one who aid the chief actor in the offence, nor present at its perpetration, but is in some way concerned in it before or after the fact. 1 Bl. 35.

In high Treason there can be no accessory, all concerned are principals, on account of the atrocity of the crime. Besides the bare consent to commit treason is in some cases actual treason. 12 Co 81. 2 Hawk 439. 40. 2 Litt 57. 4 Bl 35.

Whatever makes an accessory in felony, makes him a principal in high Treason. 1 Hawkins 58. 2 Do. 439. 40. 4 Bl 35.

Sometimes questioned as to accessory after the fact (in felony).

There may be accessories in Petit Treason, murder and other felonies, in those where judgment of Law are unpremeditated, as manslaughter, in which there can be none before the fact.

In Petit Larceny and all crimes under a degree of Felony, no accessories, all concerned are guilty as Principals. 2 Hawk 441. 1 Do 115. 132. Co Litt 57

On Clr 750. 12. Co 51. 1. Feloni 30 312.

An accessory can't be guilty of a higher crime than the Principal. As Servant causes a Stranger to murder his Master. (or husband is so served by his Wife.) servant being absent, he is accessory to the crime of Murder only. But had he been present and assisting he wd have been guilty of Petit Treason as Principal. and the Stranger of murder only. 1 Hawk 132. 2 Do 445. 3 Bl 35. 1. Hales 9 Cr. 615.

Accessories are of 2 kinds - 1. before & fact. 2 after the fact.

An accessory before the fact is one who procures counsel or commands another to commit a crime. being himself absent at the time of act.

Absence is necessary, for secus he wd have been Principal.

Idid

He who abets another to an unlawful act, is accessory to all that ensues upon the unlawful act. but not to any thing substantially distinct from it and not directly ensuing upon it. As A commands B to beat C. till he dies. he A. is guilty of the Murder as accessory. So A commands B to poison C. and B shoots or slabs him. A is guilty as accessory. If death is the substance - But if A commands B to burn C's house, and B. in doing it robs the house also. A is not accessory to the Robbery. Plow 475. Foster Cr. 370. 11. 4 Bl 37. 2 Mc Hales 337. 2 Hawk 441. 447.

To solicit one to commit a Felony. (or semble) any other offence, is a misdemeanor. if the crime be not committed. 1 Co L 208 v r b r y. 2 Est 5. 6. Mod 111. 1d Kay 1371.

If an abettor, retracts before the act is done, he and
an accessory, sensible. 80. 2 Hawk 445. Foster 354.
1. Hale 537

That Felonies as well as those at Law, admit of
accessories. But the Stat is silent as to them. The
former having the Incidents of Law Felonies
1. Hawk. 164.

The bare concealing of an intended Felony, is said
to be only a Misprision of Felony, wh^{ch} is punished
only by Fine and Imprisonment. 2. Hawk. 447. 4 Bl 121.

Misprision What? 4 Bl 110.

Persons who are accidentally present, when a Felony
is committed and don't endeavour to prevent it
and apprehend the Felon are guilty of a Misprision
and may be fined and Imprisoned. Exception in
favor of Infants. 2 Hawk 442.
4 Bl 110. 115. 116.

After the fact, an accessory after the fact is one, who receives,
relieves, comforts or assists a Felon knowing him
to be such. 4 Bl 367. Keeling 40. 77. 2 Hawkins 446.
188. 204. 5.

But the assistance given must be with intent
to hinder public Justice as to prevent the Felon
from being apprehended, tried or punished.

As harboring, concealing and furnishing felons with a
horse to escape, receiving, assisting to escape, from
Doe by Indictment. Treason the Father. To relieve
a Felon in Jail with necessaries is no offence.
4 Bl 38.

Buying or receiving stolen goods, knowing them to
be stolen, made no accessory at Law. The offence
was a mere Misdemeanor. Secus in Eng. Act by St.
5 Ann. and 4 Geo. 1. 2 Hawk 450. Cro Eliz 888
Yelv. 425. 1 Roll 68. 1 Hale 620.

By our *Jo.* receiver in such cases is made Principal.

Being must be complete at a time of assistance
to make an account. As *Jo.* is a mortal wound and
assistance rendered before death of *Jo.* party. 2 Hawk. 457. 4 Bl. 38.
on *Jo.*

It is decided in *Jo.* assisting her husband. (at and)
the actual time. *Jo.* is a mortal wound. But no other
relation considered. As *Jo.* and child. *Jo.* and *Jo.*
and even *Jo.* and *Jo.* assisted in assisting a wife
when the *Jo.* committed a killing. 4 Bl. 39. 8. 2 Hawk 45.
1 Do 4. 1. Hale 621.

Jo. one is entitled as accessory to a Principal. *Jo.*
that he was accessory to one is *Jo.* *Jo.*
2 Mc Hally, 540. 42.

It is a general Rule of the *Jo.* that accessory, unless
the same punishment as Principal. 4 Bl. 39.

But accessories after the fact, are now by the *Jo.*
entitled to benefit of *Jo.* in most cases. 4 Bl.

Formerly holds that an accessory could not be convicted
till answer till the principal was attained & *Jo.* 4 Bl. 423.

Contra now holds, but that he can't now, except
by the *Jo.* be tried. (one he does it, till the principal
is attained or the Principal is tried at the same time.

2 Hawk 453. 4. 5. 6. 4 Bl. 40. Leach C. L. 18.

4 Bl. 423. 4.

But if the *Jo.* & *Jo.* and *Jo.* *Jo.* the accessory
may be tried in certain cases. And the principal
hasn't been attained or even tried. 2 Hawk 453. 4 Bl. 323. 4.

Leach. 107.

If the principal is acquitted, the accessory is discharged.

And if the attainment of a Principal is reversed, that of
the accessory is also "facto" reversed. 2 Hawk 452. 3.

4 Co 43. 1. Hale 623 1. Roll 177.

Secus while not attended ⁱⁿ reversed, it is erroneous.

2 Hawk 452.

But the death or pardon of the Principal after attendance, don't even at Law, avail the accessory, at all.

2 Hawkins 433. Cro Clw 541. 4 Co. 43.4. Ray. 477.

But at Law the death of the Principal before attendance, tho' after conviction, discharges the accessory.

Secus now by Statute } 4 Bl 323. 2 Hawk. 453.
 Leach 107

If one is acquitted before or after the fact, he may afterwards be indicted as Principal, but if acquitted as Principal: Sub: an. he can not be indicted as accessory, before the fact. 2 Hawk 320. Leach 25. d. Tho' an accessory after the fact he may be.

1. Hale 325.

4 Bl 40. Foster 361. 2 Hawkins 3

Proof y^e prisoner was guilty as accessory will not support an Indictment as him as Principal.

2 Mc Nally 496.

An Indictment as one as accessory need not state that the Principal committed a offence. Satis to state that Principal was convicted and then to charge the prisoner as accessory. 2. Mc Nally 464. 7 TR 465. Foster 365.

Get the accessory on his Trial tho' even after the conviction of the Principal may controvert the latter's guilt in point of fact or Law. 2 Hawk 456. 4 Bl. 324. Foster 121.

9 Co. 118. 2 Mc Nally 464. 60.

So he may when both are tried together.

2 Mc Nally 465.

Mc Nally

felony is, any offence not occasioned at Law, a total forfeiture of goods, or lands or both. 4 Bl. 324. d. The term is general &c. not designating any one specific violation

of Law. into a whole class of offences. Secus of Murder &c.

The word didn't originally denote any crime but the penal consequences of certain crimes. Synonymous with the forfeiture of a fee or fund, afterwards extending to offences working a forfeiture and by an easy deduction denoting offences working a forfeiture of goods only. 4 Bl 95.7

Treason is strictly a Felony for it causes a forfeiture. Anciently comprised under the name. 3 Inst 13: 1 Hawk 84. & 36. 34. 5. But now is viewed in itself as a crime standing alone by General usage. 4 Bl 98.

Capital Punishment ant necessarily a consequence of Felony. (It's almost always subteradded.) as Self Murder.

Comicide by Chance Medley and Petit Larceny. 4 Bl 257.

1 Hawkins 140. 2 Bac 476. 1 Me Hall 208. 2 Will 2.

So & contra some capital offences are no felony.

As Heresy at Law. - Plaudonia mute when married on an Indictment. 1 Hawkins 99. 4 Bl 95.7. 3 Inst 42

All Felonies wh are punishable with death work a forfeiture of all Land, in fee simple. so of goods and Chattels. When of goods &c only. 4 Bl 97. Co Litt 391. 4 Bl 381.5.

But by general usage the word felony is now used to import a Capital crime and indeed includes all capital crimes ~~of Law~~ ^{below} Treason.

4 Bl 98.

Hence if a St creates a new Felony, the Law implies it shall be punished with death. as well as forfeiture.

So & contra if the St expressly annexes capital offence. Punishment to any offence, it offence is in construction Felony.

4 Bl 98. 1 Hawkins 150. 1 Hall 627

641. 703. Co Litt 391. 2 Bac 469. Hob. 293.

But if a St prohibit an offence on pain of forfeiting all he has, tis only a Misdemeanor.

no offence is made felony by doubtful and ambiguous words. 4 Bac 644. 1 Hal 627. 541. 703. Co Litt 391.
2 Bac. 469. 100 293.

Crimes are in the same manner (not unusual) are in crimes called felonies but no perfect crimes, in no case are the punishments. 20 Crim. 283. and 20 182.
185.5. Rep'd 533.5.

Crimes are those in which the benefit of clergy is refused.

This is intended a kind of Punishment, 4 Bac 373. 7. resembling crimes even the conviction, from punishment of death.

2 Hawkins 236. 100 213.

But the goods are forfeited by conviction and are retained
4 Bac 373.87. as to its origin 4 Bac 365.

At Common Law was allowed in Petit Treason and in most capital crimes, but not in all. 4 Bac 377. 14. It must amount to High Treason. Petit Treason, or more Misdemeanors.

The allowance in most capital crimes, sometimes by 50.
20 Crim. 3. 4 Bac 374. and extended to Petit Treason. 2 Hawk.

Originally allowed only to clerks in Orders, or the Clergy, afterwards to every man, who can read, this being the sign of his being a clerk.

But not to women. They being excluded by their sex from clerical office.

Now By our Statute especially 21 Hen. 3. 4. 5. 6. 7. 8. and Henry, and thus the privilege is retained in case of Clergical felons, to all persons, as readers, etc. non.

But some persons are by Statute & Henry, the benefit in the hand, or whopped, or imprisoned, or fined, or to suffer

some other inferior punishment.

But Clerks, Peers and Deputies are exempt.

Many persons however, are entitled to it but ~~once~~ Clerks as often as they offend, &c. as often as they commit Clergible offences.

By its allowance for any heinous felony, & ~~murder~~ is discharged, not only of that, but of all Clergible offences, before committed.

At present in Eng. Clergy is allowed in all cases of felonies except it or it is expressly taken away by Act of Parliament.

Benefit of Clergy formerly pleaded in Eng. "de Clerico" but now prayed before Judgment and before after conviction usually.

No benefit of Clergy in Court.

Homicide

Is the killing of any human creature. 4 BL 177. 1 Hawk What. 100. 3 Bac. 661.

Of Homicides there 3. kinds. Justifiable. Excusable, felonious. 4 BL 177. 1. Hawkins 104. 111. 115.

Homicide therefore not necessarily criminal. The first kind has no guilt. The 2^d very little even in judgment of Law. and only a nominal Punishment. 4 BL 177. 88.

Tortor 283. 2 Hawkins 539. 1. Ibid 108.9.

Justifiable. is of several kinds.

1. Homicide is Justifiable when occasioned by necessity.

As a Sheriff. in the last of his office executes a malefactor.

who has been condemned. There is a Legal Necessity.

4 Bl. 178. 1 Hawkins 106.

But in this case the Law must require him not to be done, and done by himself or his deputy.

1 Hawkins + Bl 178. 1 Cal 497. 501. 3 Bac 574.
106.

If a private person voluntarily and wantonly kills a person
maintained, is murder. Ibid.

The officer himself in executing a sentence of death must
pursue the sentence. Otherwise he will be guilty of murder.
as beheading for hanging. Hanging and Beheading.

4 Bl 179. 3 Bac 574. 2 Mc Nally, 559. French
L. 31. 1 Hawkins 106. Co Litt 128. 1 Cal. 501.

as the sentence must be by a competent jurisdiction.

as if a J. in Eng. or Con. J. in Am. could not sentence
of death in a person for a crime if they have not cognizance
and is executed, the officers who execute it and the
Judge are guilty of murder. 4 Bl 178. 1 Cal 497. 501.

1 Hawkins 500. 3 Bac. 574. 1 Hawkins 106. 5 Co. 106. Mod. 333.
105.30. Cro Ch 98. 13 Co 76.

But if the J. has cognizance of the offence and the
sentence of death when the J. does not subject to it.
the Judge only and not the officers are guilty. for this
is not ~~an~~ common law offence.

1 Hawkins 106. 3 Bac 574.

A homicide is justifiable in certain cases, when committed
for the advancement of public justice. as an officer in
attempting to make a legal arrest is resisted and kills
the party resisting. So in dispersing rioters, he may even
kill, if necessary, and this also holds even of private persons.
He is justified rather by the permission than the command
of Law. 4 Bl 179. Root 66. 2 Mc Nally, 559. 570. 1 Cal
Law. 494. 1 Cow. 106. 7. 3 Bac 574. 9 Co 68.

So if an actual felon resists or flees from his pursuers,
and they be private persons and not the maintainers, they are

justified in taking his life, provided they can't arrest him. with. 1 Hawkins 106. 2 Mc Nally 509. Tort 271. St. Comm 288.

And if an Innocent person indicted for felony, resists an officer, with a process of arrest on him, y officer may if necessary take ^{his} life, but not wantonly.

Tort 318. 2 Mc Nally 572.

Secus if a private person without warrant attempts to arrest an innocent person on suspicion of felony and kills him. Ibid.

It is also Justifiable where an officer attempting to make a lawful arrest, in a civil suit is resisted, so that he can't apprehend his prisoner. When an officer acts under a lawful process of arrest, it makes no difference as it be Civil or Criminal: if he is resisted, its his duty to overcome that resistance. 1. Hawkins 107. 1 Roll 189, Tort 270. 3 Inst 56.

So there are various other cases in wh he may lawfully take the life of a person arrested, tho not on the immediate Act of his Warrant. As to prevent an Escape, or if 3^d persons attempt a Rescue, and the officer can't otherwise resist them, he may take the lives of the Rescuers. Sta 499. Tort 293. 4. 2 Mc Nally 556.

Justifiable. To prevent any forcible or atrocious crime as one attempting to murder or rob another, is killed by the latter. So of breaking a house in the night.

4 Roll 180. 1. 3 Bac. 675. 1. Hawkins 108. 9.

1 Call 486. 87. 493. 4. 4 Roll 137. Tort 271. St 285.

Secus of crime unaccompanied with force, as picking pockets or from publishing a Libel. 2 Mc Nally 582

Ibid Inst.

So tho y offence be forcible, yet if it be not also atrocious, i.e. of such nature of felony, a homicide committed for the prevention of it, will not be justified as

an attempt to break into a house, in the daytime,
for this is no more than a Civil Trespass.

It follows then, that a person may not take the life of another
merely to defend his house, his goods, or his person, from
a bare trespass. But he may use some violence.

4 Bl 180.1. Tort 273. Cro C 538. 1. Hawkins
108.9. 1 Cal. 485. s. 8.

So where A strikes B, but with no such violence as to
occasion serious bodily harm, or endanger B's life.

B won't be justified in taking the assailant's life - Even
if he assaults in such a manner as threatens loss of life
or limb or other bodily harm.

There is no modern case however in which one has
been found guilty of murder, for killing his assailant,
and the General Rule is that if one kills another, in defence
of his property or a trespasser, the offence is manslaughter
merely.

The general principle is that, when a crime in itself
capital is attempted with force, that force may lawfully
be repelled, by taking the life of the offender, so that
the homicide is in such cases justifiable, and there is
no degree of guilt. 4 Bl. 181. 1st Comm 285.

But the Cts have given the Rule a more liberal
construction so that if the assault threatens so great bodily
harm, and he resists by taking the assailant's life,
he will be justified.

So if it be in consequence of any unlawful act not natural
tended to blood shed.

So if one does an idle act, not manifestly

endanger the person of some one and accidentally kills.
 i.e. Manslaughter. As throwing stones to another in sport,
 this is an unlawful act.

But if death happen accidentally in consequence of any
 lawful sport. as Football Wrestling &c. This homicide
 by misadventure only.

2^d In Self Defence. — Excusable.

This happens where one in a sudden attack kills his
 assailant in self defence. 4 Bl 182.

This is excusable and distinct from y^t which is committed
 to prevent the perpetration of a capital offence unto.
 And not to be material, who gives the first blow.
 if he who kills in self defence, was forced to fight.

But to excuse this kind of homicide it must appear
 to have been y only possible or at least probable means
 of preserving ^{one} own life. 4 Bl. 184. 5. 3 Bac 577. 1 Cow. 108. 13.
 128. Foster 273. 2 McNally 563. or at least from
 escaping from great bodily harm. 1 Hawk. 108. 13. 4 Bl 185.

When too to preserve ones life, it seems nearly akin
 to Justifiable committed to prevent an atrocious, and
 forcible crime.

Distinction between this and Manslaughter.

Is often difficult to distinguish this Manslaughter.
 General Rule. If both are fighting i.e. striving for
 victory, when the mortal blow is given — tis Manslaughter.
 but if the Slayer hasnt begun to fight or having
 begun and tries to decline and cannot with danger
 to his life or great bodily harm, tis "se Defendendo"

According to some the aggressor himself, when pressed (ut Inq) and trying to escape, is excusable in killing to save his own life. 3 Bac. 477. Now holden Contra it seems, for tis his fault. 1. How 113. 1. Hol. 479. 80. 2. Kel. 58. 61. Foster 276. 295. 278. 4 BB. 185. 6.)

And if one strikes with malice prepence and having fled and tried to decline, kills the other, to save his own life, it is Murder. 1 How 113. 123. Kel 58. 129. 128.

If both agree beforehand to fight a Duel, and one being pressed ut Inq, kills y other, he is not excused. - murder - for previous malice. 3 Bac 477. 678. Kel. 129. 131. 4 BB. 185. 1. Hol. 445. 79. 1 Hawkins 122. 123. 4. 112. Not so in all the States.

Same Rule applies to cases of fighting in general, by a preconcerted agreement, when tis not all one anticipated act of passion. 1 Hawk. 125. 6. 112. 22. Kel 117. 1. Hol 39. 475. Fumble.

So the Friends of him who kills in a duel, are murderers, and kata some, y others Treasors. 4 BB. 199. 1 Hawkins 124. 1 Trum 574. 1. Hal 443. 3 Bac. 665. 666.

This Excuse of self defence extends to y chief civil relations, as Husband and Wife Kel 137. Parent and Child. Master and Servant. The act of y relation is construed y act of y party attacked. 4 BB. 186. 1 Hal 487. 84. 3 Bac 588. 675. as to prevent great bodily harm. Infra. A Stranger may justify to prevent a forcible capital crime. Secus not. Kel. 61. 1 Hawkins 125.

Killing an officer who attempts to arrest the Player.

in the execution of his office, not Excusable - Murder
 this Warrant is Irregular and Illegal. if good upon
 the face of it 2 Mc Nally 488. 9. 561. 7 RR 455.

No one can excuse the killing of another by pleading
 Misadventure or Self defence. It must appear in P^{er}
 under the General Issue. 3 Bac. 676. 1 Hal. 478.
 1. Hawkins 115. 105. 7 N B. 246. Co Litt 283.

Punishment. Excusable homicide an by misadventure
 or "De Defendendo" is said by Co to have anciently
 been punished with death. 2 Ans. 148. 315. Denied by
 later writers 4 Bb. 188. 1 Hal 425. 1 Hawk. 114. Foster
 282. &c.

The punishment seems to have consisted anciently of
 a Total or Partial forfeiture of goods and Chattels.
 4 Bb. 188. 1 How 115. Of Total, & offence wd be
 Felony, wh Bk says tis, 4 Bb 98. 7. 1. Hawkins 114. 2
 Hawkins 447. It seems to be strictly a Felony, but it und
 elapsed with Felonious Homicide, because not Capital -
 Felony being now used as synonymous with a Capital
 crime. 4 Bb. 98.

But as far back as English Records reach, & party
 has even been as he still is, entitled of course or of
 right to pardon and restitution of goods. So that
 punishment is at worst but nominal. 4 Bb. 188.
 Foster 283. 2 Hawk 538. 39. 1. Hawkins 115. Heb. 58.

Indeed the Eng Judges usually direct or permit a
 general verdict of acquittal 4 Bb. 188. Foster 288.

No accessories in Excusable Homicide, because not felonious
 2. Hawk. 447. 1. Hal. 615. 616.

III Felonious Homicide. This is the killing of a human creature with^d Indulgence or Excuse, and may be committed by killing oneself or another
4 BB. 188. 1 Hawk. 102.

II. Homicide. by killing oneself is called selfmurder,
y Party Telo De Se. 1 How. 102. 4 BB. 189

Telo De Se is one, who deliberately puts an End to his own Existence, or commits any unlawful malicious act, the consequence of wh is his own death. 4 BB. 189.
1. Hale 413. 1 Hawk. 102.3. As one attempting to kill another and the gun bursts, killing himself. 3 Ins. 54.

If one requests another to kill him and tis done,
y Forner is not Telo De Se, but the latter is a Murderer.
Assent or Request merely void. 1 Hawk. 103. (Mo. 754.

A Person to be a Telo De Se, must be of years of discretion and Compos Mentis as in other Felonies.
not Infants under 7. Lunatic. &c. 4 BB. 189. 190.
1. Kol 412. 1 Hawk. 102. 4 BB. 189.

The consequences are Ignominious burial in the highway, impaled - forfeiture of all goods and Chattels. Forfeiture of his Lands. - for no attainder. 4 BB. 190. 387.
1 Hawk 103. Finch Law. 216. 1. Hale 413. Plow 243.
259. 262. 323. Ray 7. Doug 524. The Indignities have in most cases been eluded. - Now abrogated by Eng St. 1823

In Court. no such consequence. I suppose.

2^d The second kind of Felonious homicide, consists in killing another person with^d justification, or Excuse, and is either with or without malice. 1. Hawkins 115.
Foster Ch. 5. 4 BB. 190.

Scence 2. kinds, Manslaughter and Murder, one with malice, & other with. 1. How. 115. 4 Bb. 130. 1. Pol. 466. Malice is any unlawful or wicked motive — 4 Bb. 198. 2. an "Evil Design" Foster 258.

List. of Manslaughter. It the unlawful killing of another with malice Express or Implied. 1. Pol. 466. 4 Bb. 191. and tis either Voluntary or Involuntary.

No accessories before the Fact "in ante" unpremeditated. 4 Bb. 191. 1. Hawkins 115.

As to Voluntary. If 2. persons upon a sudden ground fight and one kills, & other tis Manslaughter.

So if they immediately go out aside and fight for tis one continued act of passion. 4 Bb. 191.

Foster 297. Leb. 115. 134. 5. Leach 157. 155. 2 The Mally 563. 8.

Different from the case of Duelling by agreement. There is deliberate intent to kill, previous Malice So. Murder. So. Semble. in case of preconcerted agreement to fight generally. 1. Hawk. 112. 122. 4 Leb. 56. 131.

If a person attempting to part others, who are fighting upon a sudden affray, is killed, & offence is Murder. provided & y. slayer knew, or had notice, & y. object was to part them. Secus Manslaughter. Leb. 66. 7. 114. 115. 1. Hawkins 127. 8. Fost 310. 372. 3 Co 81. 61. B.

If one is greatly provoked, by another's misconduct, as pulling his nose, or other great Indignity, and immediately kills him — Manslaughter generally. 4 Bb. 10. Leb. 135. 6. 1. Hawk. 125. 117. m. 1. Hal 470.

Seems if sufficient time for passion to subside.
 Murder. 4 B.C. 191. Foster 296. 294. 5. 316. So in every
 case of homicide upon provocation. Heb 27. 56.
 2. Mc Nally. 567. 1. Hall. 486. Ray. 212. 1. Bent 158.

So if on a sudden provocation, one executes his wrong
 immediately but in such a manner as manifest
 a deliberate intent to kill or do other great
 bodily harm. and death ensue, even accidentally
 it is murder. As tying a boy to a horses Tail &c.
 1. Hawk. 126. Cro Ch. 131. Palm 545. Heb 127. 1. Hall
 454. 473. 4. Foster 292. 2 B.C. 199. 2 Mc Nally. 564. 5.
 Or Parent correcting a child outrageously—

If a husband take a man in the act of adultery
 with his wife. and kills him instantly, — Manslaughter.
 in the lowest degree, 4 B.C. 191. 2. 1. Hall 486. Ray 212.
 Heb. 137. 1. How. 125. 1. Bent 158.

Bare words. or gestures, breaking promise,
 trespass on land, never a satisfactory provocation to reduce
 even a sudden killing to Manslaughter. When
 killing is voluntary or y manner of beating manifestly
 endangers life. 1. Hawk. 124. Heb 130. 131. 35. 1. Hall 455.
 6. 473. Cro E. 579. Joy. 171. Foster 290. 316. 564. 567.

Seems if it appear clearly from y manner of beating
 that he intended only to chastise and that y
 killing was unintentional. 1 Hawk. 124. 5. 1. Hall 455.
 Foster 291. 5. 4 B.C. 205. 2 Mc Nally. 564.

If upon an affray between A and B. y friend of A
 suddenly interposes and kills B. he is guilty of
 Manslaughter only. No Presence Malice.
 Heb. 136 61. 12. Co 97. Foster 315. Quere ant the Rule
 too General? 1. Hawkins 125.

Manslaughter on a sudden provocation, differs from homicide "se defendendi" in this. In the latter case apparent necessity for self preservation. In the former, no necessity, out of sudden Revenge. 4 Bl 192. 184.

As to Involuntary This as the Term imports, is always unintentional, but ensuing upon some unlawful act. "Malum in Se" 4 Bl 192. 1 Plow. & III. 12. Foster 258. 2 Mc Nally 553. Foster 261. Differs from homicide by misadventure in this, y^t the latter ensues upon a lawful act. 4 Bl. 192. Cowp 830.

If death ensues, upon an act, wh^{ch} is merely Malum prohibitum, y^e Rule is y^e same, as if the act were lawful. Foster 237. 1. Hale 475. 2 Mc Nally 553. 4. 18. The homicide is by misadventure as act of Smuggling.

If one accidentally kills another, while engaged in any rash, idle, and dangerous Sport, as by sword playing, &c.) (Manslaughter. These are unlawful acts. 4 Bl. 183. 192. 3 Ins 56. 1. Hale 472. 3. Foster 261. 292. 1. Hawkins 112. Plow. 134.

So if an act in itself is done in an unlawful manner, for, here under its circumstances, the act is unlawful, as throwing down a piece of timber or stone into the street, in a City. And y^e party gives warning. Feb. 40. 41. So shooting a gun where people usually resort. 4 Bl. 192. Feb 40. 1. Hawk 112. Plow 481. 1. Hale 472. 473. 5. Foster 263. 293. 2 Mc Nally 558. 7. 8.

If y^e unlawful act is Treason, only, the killing is Manslaughter. If Felony tis murder, ut ante. 4 Bl. 192. 3. 1. Hawkins 126. 127. 8. Feb. III. 117. Foster 258. 292. 3 Co 91. Plow 457.

Punishment. A clergyable Felony ergo not capital in Eng. in the first Instance But y offender forfeits all his goods and chattels and is burned in the hand, not his land, because not capital. 4 Bl. 193. 201. 387. No attainder.

In Court tis punished by St. when voluntary. with Forfeiture of goods, and chattels to the state. Whipping, branding and disability to give verdict or Evidence. Involuntary not within our St. (St. B. 285) What at C Law. is involuntary manslaughter is in Court, but a Misdemeanor. De. St. P. Ind. T. 1800. State vs Rogers. But voluntary may still be punished here as at C Law.

MURDER

This name was anciently applied to y direct killing of another for wh the vile or if too poor the hundred was amerced. 4 Bl. 94. 5. 1 Hawk 117. 2 Bl. 121. 24. 1 Hal 447. Foster 281. 3 Bac 661.

Murder is now described thus. Where a person of sound memory and discretion unlawfully kills any reasonable creature in being, and under the peace with Malice aforethought. Express or Implied. 3 Ins. 47. 4 Bl. 195. 1 Hawk. 118. It is the unlawful killing another with Malice prepence.

Difference between this and voluntary manslaughter. The latter proceeds from sudden passion. The former from wickedness and malice. 4 Bl. 190.

If Sound Memory &c. so must every offender be to be punishable. 4 Bl. 20. 25.

"Unlawfully kills another &c. Unlawfully arises from killing without warrant or excuse. Must be actual killing. Assault with intent to kill is a misdemeanor only. tho' formerly Murder. 1. Hall 425.6. 4 Bb. 136. 3 Bae 664.

Not only directly and forcibly taking away life, as by a blow or stab. 1 is killing within the definition. But 1st any act of wh the probable consequence is death, and wh eventually occasions death & if wilful and deliberate is Murder. As poisoning & stinging. 4 Bb. 136. 1. Hawkins. 118. 3 Bae. 662. Palm. 548. Modes of killing indefinitely vary. Str 884. Leach 141.

So of a son who carried out his sick father to his Mill in a cold frosty season. So of a woman who left her child in the field covered with leaves only. & was stricken by a kite. 1. Hall 431.2. 1. Hawkins 118. 4 Bb. 137. Palm 545. This is killing and Murder. So Parish officers who shifted a child about, till it died. 4 Bb. 137. Leach 141. So a Dealer knowing a prisoner to have an infectious disease wantonly confines with him a mother, who takes it, and dies. 1. Hawkins 119. 3 Bae 663. Str 806.

So if he wantonly confines a prisoner in a low, unwholesome room, denying common conveniences. 1. Hawkins 119. Str 883. 4. Ed Ray 1578. 1. Hall 466.

Of a person having a Beast used to do mischief suffers it to go abroad, or turns it loose even to frighten people, and it kills the owner is guilty of the killing, and in the first case of manslaughter, in the 2^d of murder. 4 Bb. 137. Palm. 431. 1. Hall 430. 1. 517. 1. Hawkins 118. 3 Bae 663.4.

2^d So in some cases, when the killing is by another. As if one incites a Madman, to kill another, or lays poison for a and he takes it. 1 Hawk 1.8.

Plow 474. 3 Co 81. (or by duress of Imprisonment compels another to accuse an innocent person, who is condemned to death, on the latter's confession) Sir 14. 3. E. 1. Hawkins, 3. 118. 3 Inst 91. 1 Hal 431. 436. 442. 467. 3 Bac 663. Plow 19. a. 1 Keb 53.

Whether bearing false witness with intent to take away one's life, is such a killing as to amt to murder, at O'Law, provided the innocent person is condemned, and Executed. Quere. Leach 441. Fort 132. It was by the ancient O'Law. No instance for many ages. 4 Bl. 196. j. Fort 132. 2. Hawk 119. n. 3 Inst 48.

In Comt by it bearing false witness & wilfully, and of purpose to take away wilfully any man's life is punished with death. It Comt 182.

If a Physician he gives a potion &c to cure but wh kills, homicide by Misadventure only. But it has been holden that if the person be not a regular Physician, tis at least Manslaughter. Sed Quere. 4 Bl 197. 4 Inst. 257. 1 Hal 430. 3 Bac 664. 1 Hawk. 131.

But no person can be adjudged to have killed another in Law, in the death happens within a year and a day, in consulting wth the whole day &c. is to be reckoned the first. 4 Bl. 196. 3 Bac 60.

But if he dies within that time, no excuse for the other, y^t he might have recovered, if he had not neglected &c. 1. Cow. 119. 3 Inst 53. 1 Hal 26. 1 Keb 17. 1. Hal 428. But if the wound or hurt be not mortal, and the party is killed by the remedies used, and not by the wound &c. not homicide, but this must

appear clearly. 3 Bac 665. 1. Hal 428.

If a person indicted for one species of killing
not convicted by Evi of a totally different species
as poisoning for shooting, Slaining for drowning.

Occurs when they differ only in circumstance as
wound given by an axe, & Club. &c. but alledged
to have been given with a sword. 4 BB. 196. 3 Anst
319. 2. Hal 185. 2 Mc Nally 520. 22. 2 Hall 291. 9 Co 67.

But if several are Indicted a as giving the
blow and B. &c. as present, aiding &c. Evi that B
gave the blow. and that a was present aiding and
abetting will maintain the Indictment. 1. Hal
437. 8. 2 Hal 232. 9 Co 87. 112. 4 Co 42. 6. or 6. 1 Plowd 98.
2 Mc Nally 522. 5. 539. For both are guilty as Principals.

The Indictment must state that the prisoner gave the
deceased a mortal wound, or bruise. Leach 98. 12. & suppon
where the means employed were violent as Slabbing
Stinking. Secus of Poisoning. Slaining &c. & conclude,

A reasonable creature in being and under the peace;
Admir and dillaws are within the Rule Killing any
person whaterer in an alien enemy in time of war.
may be Murder. 4 BB. 197. 8. 3 Anst. 50. 1. Hal 453
3 Bac 665. 1. Hawkins 121. All under the peace.

Killing a child in ventre Sa there is a great tortious
only. not in natura for this purpose.
3 Burr 665. 4 BB. 198. 1. Hawkins 121. Misprison is a
high offence under the degree of capital but bordering
upon it. 4 BB 169. Hal 71. 1 Hal 374. 1 Hawkins 86.

But if the child be born alive, and afterwards dies
of the wound. I rec^d in ventre Sa there, tis Murder.

by the better opinions. 4 Bb. 198. 1. How 121. 3 Inst. 50.
1. Kel 433. Comt. But the death must be within one
yr and a day.

Epithet "reasonable" in the definition means human
I suppose. not "having the faculty of reason".

Madmen & idiots, are within the definition
Inciter of a madman to kill himself, guilty of Murder.
1. How. 118. 1. Kel 431. 436. guilty as Principals.

If one counsels another to kill another in ventre Sa-
mere, and being born, it is killed in pursuance,
he is accessory to Murder. 1. Howkins 121. Dyer 186.
2 Inst 51. Kel 127. 1 Kel 429. 433.

By St 31. Jam. 1. and by the last St Law of Comt
if the mother of a bastard child (found dead)
endeavours to conceal its death by burying it privately
or in any other way, deemed guilty of Murder. 4. Black 118.
unless she can prove by one witness at least, that it was
born dead. 1. How 121. 3. Bac 665. St Comt 321. 2 Mc Malley
581. Now. the former St of Comt repealed. Punishment
under new St sitting on the gallows. binding to
good behaviour. and imprisonment at discretion of the
Ct.

The construction given to these Sts here and in Eng
makes necessary to the mother's conviction presumptive Ev.
at least, that the child was born alive. 4 Bb. 198.
2 Inst. 363. 4. Lely 32. 2 Hawk 619. 2 Mc Malley 582.

"With Malice aforethought express or Implied".

Grand Criterion - it ant strictly Spite, or Malevolence,
to the deceased, but Evil design in General, & dictates
of a wicked, depraved, malignant mind. 2 Mc Malley
548. 4 Bb. 198. 9. Fort 256. 2 Role R. 461. Kel 126. 7.

The Ct and not the Jury are Judges of the ~~malice~~ Malice, 1493. 2 Str 773. 4 Burr or Pac. 396. 474. 337. 30 B. 418. 12. of what amt; in law to malice so that the facts being given, the point is a question of Law. 2. Mc Nally. 574. 3c.

Malice Preconceived. is Express or Implied.

1st Said to be Express. 1st when one with a deliberate and formed design to kill or otherwise personally to injure. some particular Individual, kills him in Ex^{ec}. of that design. as lying in wait; former Menaces. Old Grudges. &c. are Evi of that formed design. 1. Hal 451. 1. Hawk. 121. 2. 3 Bac 666. Kel. 127. 30.

2^d Where one kills by an act wh indicates enmity to all Mankind. as shooting into a crowd. 4 B & C 199. 200. Lamb. Fort 261. 3 Bac 665. 1 Hall.

Distinction not well taken by B & C. 4 vol 199. 200. Express Malice seems to me to be that wh in point of fact concurs with an act of killing. - Implied that wh so concurs only by Implication of Law. 1 Hawk. 122. 2. 1. Discharging a ball: with intent to kill or hurt J or whosoever it may strike - 2^d Doing same act wht intent to kill and steal an &c.

So in the case of deliberate duelling, it is Express. 1. Hawk. 122. 1 B & C. 80. 7. Kel 129. No excuse that the party slain attacked first, or that he didnt intend to kill. but disamm. for the deliberate design is Express Malice. 3 B & C. 171. 1 Hal. 452. 3. 4 B & C 199. Kel. 274 3 East 587. Fort 296. 7. 2 Mc Nally 588.

So the Second of the person killing, are guilty of Murder, by Express malice and that some more of the opposite party. Inve 4 B & C. 199. 1 Hawk. 124.

Giving a challenge is at O'Law. a high Misdemeanor
3 East 581. Here the punishment is prescribed by 26.

If a person upon no provocation or a slight one,
suddenly attacks one and kills, tis Murder.
by Malice Express. 1 Hal 27. 51. 122. 27. For so cruel
and ferocious an act. in such a case is Evi of
hardened deliberate Malignity towards the deceased.
1 Hawk 124. Foster 258. 36 calls this implied malice.
4 36 200. Quere wh is right. It seems to me
Express. Quere.

So generally, if one on even a sudden and great
provocation, he beats the other in a cruel and
unusual manner, and kills him. - Tis Murder
by Express Malice. 4 36 199. As case of the boy tied
to the horse tail - 1 Hawk 457. 473. 74. 1 Hal 127. 1 Hawk
127. Cro El. 131. Palm. 545.

So if on a sudden quarrel he who kills, seems to
have been Master of his passion at the time, tis
Murder and the Malice is Express. 1 Hawk. 123.
1 Hal 58.

If one committing breach of peace, or by fighting,
suddenly kills an officer of the Peace who attempts
to suppress it. he is guilty of Murder. 1 Hawk 127.
1 Hal 66. 2 Mc Hally 589. 73. 3 Inst 52. 4 Co 40. 1 Co
68. Fort 308. 10.

As of a private person acting in aid of a person, who
is officer. or if no officer be present. 1 Hal 66. 114.
But y object of the Interference must be made known,
in in the case of an officer known to be such, 1 Hawk
acting within his district. Secus only Manslaughter Foster
135. 311.

2^d Malice is implied, when the killing is in consequence of an unlawful act, intended altogether or principally for some other purpose, than that of killing the person the person slain. 1 Hawk 122. 20. 4 Bb. 200. 201.

As one shoots at a fox with intent to steal, and kills a person accidentally, or shoots at a and kills B or lays poison for A, wh B takes. 4 Bb 200. 201. 1 Hawk 120. 2 Bb 11. 11. 1 Bb 405. 74. Mo 57. Plow. 101. 3 Bb 207.

But y intended act must be felony. Secus the killing is regularly manslaughter. 3 Bb. 575. 7. 1 Hawk 112. 113. 26. 8. 2 Bb. 11. 11. 4 Bb. 183. 192. 3.

Express seems to be that, wh in point of fact concurs with y act of killing the person slain.

Implied that, wh only concurs only by Implication of Law. 2 Mc Naley, 549. 2 Hawk. 122. 6.

As supra and y following, The gives poison to a woman, to procure abortion and it kills the woman. Malice implied. 4 Bb. 201. 1. Bb 429. There is the act intended felony?

Subana gave his wife a poisoned apple to kill her. she gave it to her child and killed it. not herself. Implied. 1 Hawk. 126. Plow. 473. 3 Ans. 57. 9 Co 81. Penk 555. 1. Bb 436. 441. 467. 2 Mc Naley 554. 55. Foster 261. 2 Bb. 11. 1. Bb Ray. 158. 2 Mc Naley 555.

But when one kills in consequence of such act as indicates enmity to all mankind, And not to y deceased in particular: as Express. as willfully shooting into a collection of people and killing one. 4 Bb 199. 200. 2 Mc Naley 554. 2 Bb Ray 143. 1 Hawk. 113. 1 Bb 476. 3 Ans 57. Foster 261. 2. Here y intent

concurs with y act of killing, y intent being to kill any one y ball might strike.

If one kills an officer in a struggle to escape from arrest - tis murder by malice implied. Design was primarily to escape. 1. Hawk 126. 129. 1 Kel 86. 130.
1. Kel 463. Tost 29. 135. 308. not to injure the officer.

In the last case tis no excuse that the price was erroneous. - not void by being so.

Same Rule tho' y officer did not inform, for what cause he was about to arrest. So, tho' y officer, if he was a public one, didnt show his warrant, before hand.
1. Hawk 129. 130. 360. 66. 68. Toster 137. 311. 312. 18. Cro S. 280. 486.
2. Mc Mahay 571.

All homicide is presumed to be Malicious. Onus probandi is on the accused. 4 Bl. 201. 9 Co of B. Toster 255. 1 How 124.
Kel 27. 112. 2 Mc Mahay 546.

Therefore all homicide is Murder of course, viz.
1st Justified by command or permission of Law.
2nd Excused on the ground of Misadventure or Self Defence.
or 3^d Alleviated into Manslaughter, by being either y involuntary consequence, of some unlawful act, not amounting to Felony, or occasioned by some, sudden and violent provocation. 4 Bl 201.

If several are engaged in a preconcerted unlawful act, and one of them in Ex^{ce} of the General Design, kills a 3^d person, They are all guilty of Murder. Shew if y killing is not in Ex^{ce} of y General design, and the others dont aid or consent to it, then the Slayer only is guilty Kel 113. Tost 357. So if the unlawful act is not preconcerted: as in a sudden affray. Kel.

Punishment of murder is death, originally clergyable so that unlearned offenders only were capitally punished. 4 Bl. 201. 1 Hal 450.

Now by 3. Eng. St. 23 Hen 8th 1. Edw. 6th and 4 and 5. Ph. Man. the clergy is taken away from Murderers, their abettors, procurers and counselors 4 Bl. 201. 2 Hawk 488. 9. 631. 3 Br. 53. 2 Hal 399. These St. don't seem to accessories after the fact.

In Court to death by St. St. 320. 21. Indemnt. 40. He be hanged by the neck, till he is dead. 2. Hawkins 631. 2 Hall. 399. 3 Br. 57. 21. 4 Bl. 403.

A woman condemned during gestation (quick with child) Est. is respited, till her delivery. But this is no Excuse for not pleading or for Indemnt. being delayed. 2 Hawkins 658. 2 Hal 413. 4 Bl. 395. 4.

But respiting for this cause can be had but once. 2 Haw 658. 2 Finch. 478. 3 Br. 17. Becoming Insane ante. 4 Bl. 395.

Est. ant complete till y convict be dead. On revival he must be hanged again. Former hanging being no Est. 4 Bl. 406. 2 Hal 412. 2 Haw. 658. Finch. L. 467.

Note when murders an officer, endeavouring to arrest him, the prosecutor ant bound to shew. that the deceased was an officer. otherwise Man by proving he acted as such. 4 T.R. 366. 2 Mc Kally 488.

Quere may not the prisoner then prove that the deceased wasnt an officer. I must be may. The rule relates only to the proof necessary to be adduced by the Prosecutor.

Petit Treason.

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There are certain Instances, in wh Murder, as being more than ordinarily heinous, is denominated Petit Treason. It is indeed no other than Murder, in its most odious form and degree. 4 BB. 202. 4. Toft 107. 324. 36.

At C Law many offences were called Petit Treason wh are now. 1. Piracy by a Subject. Grand Jurors discovering the Kings counsel. Wifes attempting to kill her husband. 1. Hawk 131. 3 Ins. 202. 1. Cal 377. 382. 5 Bac 140.

Now by St 25. Edw. 3. no offence can be Petit Treason in the following Instances. 1. Where Servant kills his Master. 2^d Wife her husband. 3^d in Eng an ecclesiastic his Prelate. 5 Bac 141. 3. 4 BB. 203. 1 Hawk 131. 2 Mc. Nally 574. 5.

Called Treason by reason of the violation of private allegiance. in addition to Murder. 4 BB 203. Toft 107. 324. 36.

Killing of a husband &c not Petit Treason, in under such circumstances as wd make y killing of another person Murder. 5 Bac 141. 1 Hawk 132. Dyer 254. 1. Cal 378. 80. as Petit Treason includes Murder.

If a woman divorced a Mensa &c. kills her husband, & traitress. Treason of a vinculo. 4 BB 203. 1 Cal 380. 381. 1 How. 133. n. 5 Bac 141.

If a wife procure a Stranger to murder her husband being herself absent, at y time, she is accessory to murder only. But if a Stranger procure the wife to do it, he is accessory to Petit Treason. 5 Burn 142.

3 Inst 20. 139. 1 Hall 24. 5. 1 Hawk. 132. 1 Syer 128. 332. -
 For the nature of the accessory guilt follows that
 of the Principals.

Murder of owner's Mistress or Master's wife. Petit Treason
 tho' not within the letter of 25. Edw. 3. 5 Bac 142.
 3 Inst 20. Plow. 86. 1 Hawk. 132.

So murder of one who has been master, upon malice
 conceived during the Service, is Petit Treason -
 because in Ex^t of a treasonable intention. 1 Hawk.
 132. Plow. 266. 1 Co 99. 5 Bac 142. 4 BB. 211.

Murder of a father by a child, not held Treason
 in the letter is by reasonable construction a servant
 to the Father. 1 Hawk. 131. 2. 3 Inst. 20. 1 Hall 380.

Originally clergyable. Clergy taken away by St 12. Hen
 7. from aiders, abettors and counselors by 23. Hen. 8th
 4 and 5. Ph. Mary. 4 BB. 204. 5 Bac 141. 4 and 5
 Ph. Mary. takes it from accessories after the fact.
 1 Hawk. 133.

Punishment in case of a male, to be drawn
 to the place and hanged. Female. to be drawn &c
 and be burnt. 4 BB. 204. 1 Hall 382. 2 Hall 399
 3 Inst 311. 2 Hawkins 631. 1 Hawk. 133. On an
 Indictment for Petit Treason, a person may be
 convicted of murder. Leach 399.

Arson Arson

Is the wilful and malicious burning of the house
 or outhouse of another. 4 BB. 220. 1 Hall 558. 3 Inst.
 66. 2. bid 188. Leach 218.

Not only the bare dwelling house, but all out-
 houses. that are Parcel of it, i.e. within the curtilage
 or homestead as Barns, Stables, & may be the subject

of Arson. 4 Bb. 221. 1. Hal 567. 4 Co. 20. 1 Hawk. 165.

So a barn filled with h. com. is within y definition, tho not parcel. 4 Bb. 221. 1. Hawk. 165. d.
3 Ins. 69. Burning a Stack of corn anciently Arson
not now. 4 Bb. 221. 1. Haw. 165.

Burning the Frame of a house is not arson.
because not within the meaning of "Domus"
1. Hawk. 166. 1. Hal 568. 3 Ins 167. 1 Burns 289. Burning
a prison is Arson. being the house of y corporation.
wh owns it Leach. 67.

Arson may be committed by burning ones own house,
(it is said) if another's house, is burnt in consequence
of it. But here the offence consists in burning y latter.
4 Bb. 221. Cro & 377. 1. Haw. 166. Leach. 217. 219.

For if one Leased in Fee or possessed for yrs of a house
standing at a distance from all others, burning it, not
Arson. 1. Hawk. 166. Cro Ch. 377. 1 Ins on Bone 357.
Toster 116.

And if one so Leased or possessed in town, burns his
own, with evident intent to burn another. but
actually burns his own only. not Arson. 1. Hawk. 166.
1. Hal 568. g. 4 Bb. 221. Hal 29. Toster 115. 116. Cro Ch 338.
By much the stronger opinion Leach 217. 19. Hal 29.
So if he is in possⁿ & on agreement for a Lease for yrs.
Leach 219. So of Tenant from Year to Yr. Leach 239.
235.

But the wilful firing of ones own house in a
town, is a high misdemeanor, incurring fine Imprisonment
bailor, and Sureties for good behaviour during life
+ Bb. 221. 1. Hal 568. 1. Haw 167. Hal 29. The Indignit

shd not be for arson. *See* 29.

If a Landlord or Reverser burn his own house while in possⁿ of his Tenant, it is Arson. It is his Tenant's house. 4 BB. 221. Foster 115. 1 Hawk 166.

Arson in Com^t is substantially y same as at C Law. in that by our st the burning of any barn, house or outhouse is Arson. *See* 182. 185.6.

The punishment here is different, under certain circumstances from the same at C Law. It extends to *thefts* and *beasts*. At the meaning of these are arson in Com^t are arson? The punishment is the same, but y offence I trust wd hardly be called arson.

"Burning" what? Neither a bare intent, nor an actual attempt, by applying fire, is a burning if no part be burnt. But the actual burning of any part, is tho' it be extinguished or go out itself. 1. Cow 167. 1. Cal 370. 3. Ins 66. 4. BB 223. 2. McHale, 605.

Burning must be "malicious" *See* only a Trespass, burning thro' negligence or accident, not Arson. 1 Cow 167. 1 Cal 389. Plow. 470. 4 BB. 222. As if one is shooting, accidentally fires a house.

Yet if one intending maliciously to burn a's house, accidentally burns. B'y: it is Arson for the *Telonus* Intent. 1. Cow. 167.

Is a C Law felony punishable with death.

Burnt to death in the reign of Edw. 1st 4 BB 222.21. and not clergyable 4 BB 374. But it seems to me to have been entitled to Clergy

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by St 25. Edw. 3. but was ousted of it first by
21. Hen. 8. wh being repealed by. 1. Edw. 6. it was
ousted again by. 4. 5. Ph. Mary. 4 Pl 222.3. 2 Hawk 481
583.

Demise also to necessary. before & facts by. 4. 5.
Ph. Mary. 4 Pl 223.2.

By our St this offence if committed by a person
of the age of 16. or more. is punished with. St Ch. 182.
if prejudice or hazard happen to the life of any
one. It extends to Barns. Outhouses. Ships. Vessels.
Suppose a person under 16. commit y act - punishable
for Misdemeanor?

By another St of ours. if any male of the
age of 16 or more. shall wilfully and feloniously
burn. or attempt to burn. by setting on fire any
state house. County house. town house. School
house. Church. Outhouse. Shop. Store. Ship or
Vessel. and no prejudice or hazard.

Heagate at the discretion of the Ct. not exceeding
7. years. St 185. 556.

For the second offence, confinement in Newgate.
for any limited period or for life. But kata
to the general Rule the second must be committed
after a conviction for the first. 1 Stow 168. 1 Hal 3.
24. or. 324. 570. 685. 872 323. 2 Bull 349.

In the case of a female, confinement in the common
Workhouse, or common Goals in the county in wh the
offender. for the same period, as Males in Newgate
St 186. Must She be 16?

Do the words in this St., "attempt to burn by setting on fire" mean such burning as will within a few days destroy the building? It seems that they do. If so, it may be argued, yet the burning by the first St., must be total & sure?

It made a different thing - Different St. burning has a determinate meaning, in Law.

Does then the partially burning of a Ship or Vessel, come within the meaning of the 1st St. I conceive it does. The same act is contemplated in case of a vessel, as in the case of a house.

Burglary.

It is the act of breaking and entering into the mansion house of another, in the night season, with intent to commit a felony. 4 Bl 224.

3 Ins 63. 1 Cow 159. 1 Bac 335. 1 Hal 549.
2 Hal 350. The usual definition.

As to y place, seems not absolutely necessary that the breaking shd be of a mansion house, Hall of a town or church. as 4 Bl. 224. 1 Cowk 162.
1 Bac 335.

The necessity of the subject being a mansion house, obtains in the case of a private building only, 4 Bl 225. 1 Cowk 162. The definition ought to include churches and Halls of a town. 2 The Mole 600.

The insertion of y word mansion seems indispensable in the Indictment when the breaking is of a private house. - See not Gemble. 1 Cowk 162. 1 Bac 335.

The Germ. Mansuonhouse includes all outthouses, wh are parcel &c. and within the curtelege, and homstal. Being protected and broyledged by the Capital house. 4 Bb. 225. 1. Hal 558. 1. How. 163. 3 Ins 64. Hal 27. 52. 82. 1 Bac 335. Poph. 42. 52. Leach 320.

The curtelege seems to be that portion of ground, wh is enclosed with the house, by one common fence, or connected with it directly by a defence. Therefore an outthous &c. feet distant, seperated by an open passage, & not within nor connected by any fence, inclosing both, - adjudged not within y curtelege. 1. Hawk 113. n. Leach 145. 1. Hal 558.

Room or lodging in a private house (if the owner dont lodge in it or if he enters by a different outward door) is the Mansuon house of y lodger. Secus if the owner lodges in it and enters by the same outward door. Here there is only one Mansuon house that of the owner. 4 Bb 225. Hal 83. 4. 434. 1. Hal 558. 1. How 163. 4. Coup 1. Salk 532. 1. Hawk 164. 1. Hawk. 163. com. Hal 27. Leach 90. 230. 364. 278.

An uninhabited house cannot be the subject of Burglary.

If A has a Shop. and within his curtelege and lets it to B to work in, who never lodges in it. Burglary cannot be committed in it. It aint a Mansuon house, being severed by the Lease, nor B's. for he never lodges in it. 4 Bb 225. 226. 1. Hal 558. 1. Hawk 164. Tulton 33. 1. Bac 335.

Secus if the Shop lodges in it. 1. Hawk 64. n. or if it were not leased by the owner.

A house in wh one sometimes reside, tho left for a short season. "Animo reverendi" is a mansion house. Tho no one is in it at y time. 4 Bl 225. 1 Paul 566. Tost 77. .. Slow 162. Mo 660. Kel 52.6.7. 40. 4 Co. 40. Poph. 40.

So a house wh one has hired to reside in, and brt part of his goods into, tho not lodged in. Kel 46. Tost 77. Ray 276. 1 Hawk 162. The house of a corporation is within the definition its officers living in it - Mansion house of the Corporation. 4 Bl 225. Leach 87. Tost 38.9. 389 1 Bac 335. Not committed in a tent or booth - temporary - 1 Bac 335. 4 Bl 226. 1 Slow 164. it is a tabernacle.

Under our St burglary I may be, not only as at C Law. but by breaking &c. a Shop, in wh the goods were and merchandise, tho at a distance &c and not lodged in.

Decided in Comt that y cabin of a vessel containing goods. may be the subject of Burglary. Rost 63. Quere Minum?

It is essential that the name of the owner of the owner of the house. be inserted in the Indictment. Leach 243.

"Night Season" formerly it might be committed at any time between sunset and sunrise. 4 Bl 224. 1 Bac 334. But now the time includes only y time between the evening and morning Twilight. 4 Bl 224. 1 Kel 300. 3 Ins 63. cannot be committed during Twilight.

It is said that if there be so much daylight or Twilight yet one's countenance can be clearly discerned, "not night season" within the definition.

But it must be daylight or Twilight - not Moon Light. 4 BB 224. 1 Hawk 160. 7 Co. 6 a. b. 1 Role. 524. 2 Mc Nally 600. 601.

As to y manner. Both breaking and entering necessary. need not be at y same time. Breaking one one night - and entering on another, sufficient. 4 BB 226. 1. Scal. 524. 1 Kel 67 68. Leach. 342.

Breaking may be, not only by thrusting open a door. but by breaking or taking out a pane of glass. picking a lock. opening it with a key. lifting a Lock or loosening and fastening - 2 Mc Nally 601. 2. 4 BB 226. Haw. 160. 1 Scal 508. 527. 531. 2 -

So coming down chimney, for tis as much closed as the nature of y thing will admit.

Breaking Fixtures in the house, as Cupboard. Chests. &c not within the definition it seems. Fort 108. 9 Kel 31. 1 Scal 527. 2 Mc Nally. 600.

Entering by an open door not breaking within y definition. Secus if having entered, he break an Inner door. ut Sup. 4 BB 226. 1 Scal 533. 1 Hawk 160. Kel 67. 2 Mc Nally 601. 2. This last is breaking the house, breaking a chest is not.

Whether breaking out, y party having entered with intent &c without breaking or being in by the owners permission) is a breaking within the definition at C Law. opinions contrary. 4 Bl 227. 1 How. 161. Here the Entry is before the breaking as taking lodges^{as} with intent &c. So if being in the house at Sup. without a previous intent &c he commits a felony and breaks out. Secus in both cases if he goes without breaking. 1 How. 160.

Entry procured by fraud (with intent &c. ut Sup) is Burglary as being let in. under pretence of business and then stealing - or procuring an officer to enter under pretence of searching for traitors & stealing ut Sup. There is a breaking opening being occasioned ut Sup. 4 Bl 226. 1 How 161. 1 Cal 42. 52. 44. 63. 82. 1 Cal 352. 55-2. 3 Ans 64. 1 Bac 333. Law not thus to be evaded.

If a Servant open and enter his master's chamber door. (without intent &c) or a lodger in a private house or Inn. open and enters another's door. (with intent) his Burglary, Breaking and entry. of the Manserhouse of the Proprietor 4 Bl 227. 1 Cal 67. 2 Mc Nally 601.

So if a Servant in the house conspires with a robber. and let him in by night, that he may rob. both are guilty of Burglary 4 Bl 227. 1 Cal 881. 1. Cal 523. 1 How. 162. 1 B. 1784. 2 Mc Nally. 604.

"Entry" The least entry with the whole or part of the body, or thrusting in an instrument or weapon

as a Pistol. hook. &c. discharging a gun.. 4 BB. 227. 1. Hall 533. 53. Burglary Entry. Tort 108.
How 161. 2. Leb. 517. 1. Bac 334. 2. Mc Hally 603.

But it seems the Instrument must be introduced for the purpose of committing the larceny with a hook. to draw out goods. - a pistol, gun &c. to demand money. Decided in Bailey 1783. That boring a hole thru the door. so that there were chips on the inside - was not a complete Entry. not being introduced to take property. 1. How. 162. n. Leach 342. or to kill or intimidate for a purpose of robbing.

Does Quest. as to a case put of turning the key of a door. locked on the inside. 1. How 162. 1. Bac 334. Leach 342.

On an Indictment for breaking and stealing Def may be acquitted of the breaking and found guilty of the Stealing. Leach 891.

If several join to commit a Burglary. some of whom stand at a distance and watch. while others break in. All are guilty of the breaking &c. 1. Bac 334. 1. Hall 80. 81. 439. 505. 1. How. 162. Foster 350. Leb. 111. 2. Mc Hally 604.

"With Intent" To constitute Burglary there must be a felonious intent. See the Breaking &c. are a mere trespass. 4 BB. 227. 1. How. 164. Dyer 29. Leb. 30. 67. 1. Hall 562. In Decided case. A Servant having run away, returned to take his own money. 1. How. 164. See also it been to rob. & murder. steal. 1. Bac 336.

Satis. if y intended act. is a Felony. And not
 @ Law. as rape, wh is not a @ Law felony. Hawk
 164. 4 BB. 228. It 481. for a Felony has all
 y properties of a Felony at @ Law. 1 Bac 336

Not necessary that y intention shd be executed.
 intent alone satis. of the intent. The Jury are to
 judge. 4 BB. 227. 8. 1 How 159. 1 Hal 549. 2. bid 360.
 Fort 107. 1. Hawk. 165. n. 1. Bac 336

After one has been acquitted on an Indictmt.
 for breaking a house. &c and stealing y money of a.
 he cannot be Indicted for y same breaking and
 stealing the money of B. But for the Theft he may be
 Ind. 30. 52. 2 Hawk. 527. For the breaking &c is y same
 in both cases. aliter of the Stealing.

Punishment.

Burglary is a Felony at @ Law. but clergyable.
 Now punished with death, Clergy being taken
 away by St 1. Edw. 6. and 12. 18. Eliz. also taken
 away from accessories before the Fact. by St 3. 4.
 W. Mary. 4 BB. 228. 1. Hawk. 165. 2. Hal 364.
 1. Bac 336. These. It extends not to accessories
 after the fact.

In Court. for the first offence. Newgate. if a male
 St 186. not exceeding 3 yrs. for the second not
 exceeding 6. yrs. - for the 3^d during life.
 St 184. In common cases. But if the Burglar
 be guilty, in the perpetration of Personal abuse.
 force or violence. or so armed with any
 dangerous weapon. as clearly to indicate violent
 violent intentions. Newgate. during life for y
 first offence.

Dangerous Weapon. i.e. Weapon of Death. I suppose.

"Violent Intentions" 12. against any person, or any one who shall oppose them. Resolved in Court that burglary being an offence in Common Law may be prosecuted as such, and yet the Statute only declares the Punishment. Root 59.

Females confined in a Common Workhouse or Common Jail. not Sub. 12. for the first offence: not exceeding 3. yrs. &c.

Larceny.

Of Larceny or Theft. 2. kinds. 1. Simple. 2^d Mixed. Simple is plain Theft, unaccompanied with any aggravation Mixed or compound includes in it, y. aggravation of Taking from ones house, or person. 4 Bl. 229. 1. Hawk. 134.

I. Simple - is the felonious taking and carrying away the personal goods of another. 4 Bl. 229. If y. goods are above the value of 12. pence, y. offence is grand Larceny. If that value only, or under it, it is Petit Larceny 1. Seal 583. 4. Tost 121. 4 Bl. 229. 2. Bac. 475. 1. Hawk 134. 145.0.

If goods above the value of 12. pence, are stolen by Several, each is guilty of grand Larceny. 1. Hawk 145. Stealing under the value of 12. pence at several times, from y. same person. not grand Larceny. 1. Hawk. 145. n. S. B. 1784. Leach 265. Old Books contrary 1. Seal 531. 2. Heb. 712.

The difference between grand and Petit is in the value of the goods. Hence the rules laid down with regard to the nature of Simple Larceny, in General, apply to both Grand and Petit 4 Bl. 229. Hawk 146. Tost 73. In punishment they differ essentially. Ibid.

"Taking" General Rule that every felony includes a Trespass. Hence, if a party is guilty of no Trespass in taking: he cannot, according to the Rule, be guilty of felony in carrying away.

2. The Nally. 586 2 Bac 472. 1. Hawk. 134. 1. 24. + 36. 231. (Quere at y^e time? next pa.)

The goods must therefore, be taken from y^e poss^r of the owner, actual or constructive.

1. Hawk. 352. n. A constructive poss^r is a right of present poss^r. 1. T. R. 480. 4. Ibid 489. 7. ibid 9.

Hence if one finds goods, and converts them *animus furandi*. Not Larceny. No Trespass. The taking is per se lawful. So generally one possessed under a delivery, by the owner, is not guilty of Larceny if said, by afterwards embezzling. 2. Bac. 472. 3. 4. 36. 230. 1. Inst. 103. 1. Hawk. 134. 5. 1. Hal. 584.

As a Carr. of goods, who converts &c. A Tailor of Cloath.

Quere as to y^e cases *Supra*, of delivery to a Tailor. For lately holden as a general Rule, y^t when the delivery is for a certain Special purpose - over having a right to countermand y^e Delivery. Leach 142. The poss^r is in the owner. Ergo embezzling "*animus furandi*" is a Felonious taking as a wackmaker embezzling "*animus furandi*" a coach delivered to clean - 3 B. 1779. Cloaths delivered to be washed. 3 B. 1758. Gunneas delivered to be changed. 5 B. 1778. In these cases a previous intent to steal seems not be supposed. (But poss^r being in the owner, taking &c. with felonious intent, is a felonious taking from the owner. 1 Hawk. 135. 136. (The taking in these cases, need not be Trespass))

To of goods delivered for safe custody 1 B. 179.
 1 How 130. n. Feb. 81. 2. Cow 294. d. Quere ergo as to
 the general Rule, East pa. Leach 242. 349. Dyer 5.
 2. Mc Hally, 588.

If one obtains a delivery with intent to steal
 and carries away or embezzles, tis Larceny. So by
 the ancient Rule, in obtaining a Bill of Exchange
 under pretence of discounting but with intent to
 steal and then converting it &c. 1. How 135. n.
 137. Leach 266. 213. Feb 81. 82. 1. How. 50. 57.

Leach 352. 6. 95. 231. 91. 2 Bac 473. 3 Ans. 108.
 Hal 63. 1. Sid 254. 2 Mc Hally 589. In fraudem
 Legis." of wh he can take no advantage, possⁿ
 remains in the owner in Law. (For tis said the
 felonious intent, extinguishes y contract, or permission)
 Ergo the owner retains possⁿ in Law. Feb 82. 1 How. 135. n.
 For the Taker shows his original intent to have
 been, not to take on the contract, but to steal
 Ray 275. 76. Feb. 81. 2. "What need is there of considering
 y contract as extinguished, where there is seen a
 right to countermand?"

Quere if the pretence were to buy and the property
 was sold and delivered. Hence y constructive possⁿ
 is parted with. Leach. 401. 55. 358. Vendor's right
 of possⁿ transferred by the terms of the contract.
 Aliter in the above case of Bailmt.

To obtaining goods from an officer with intent
 to steal, under a Replevin or by virtue of an Ed
 on a Indgmt obtained by fraud on the Ct &c.
 is a Felonious Taking. 2 Bac. 473. 3 Ans. 108.
 Feb 43. Ray 276. 1 How 236. For the Replevin
 and Indgmt are void.

Seems clear, y^t if a carrier, having earned y goods to the place, takes ym "animo furandi" y taking is felonious. tho no felonious intent originally, for the bailment is determined, ergo. he is a Stranger.

1. Feo 136. 3 Ins. 167. 1. Hal 505. 2 Bac 473.

Hel 83. 4 BB 235.

So if he takes them to a different place, from y^t of their destination and then embetwiles "animo furandi" Hel 81.2. 1. Hal 504.5. So in the case of hiring. Leach 358.

So if a carrier opens a bale of goods and takes away part or pierces a cask. it is felonious taking. Because as some say, he had no property in the goods. Quere. tho he had in the thing containing. 2. Bac 473. BB says because the animus of furandi 4 BB. 230. Hawk says because possⁿ of part. distinct from the whole is gained by wrong. 1 Hawk. 135. 2. Mc Nally! 587.

The true reason seems to be that the possⁿ in Law is, all y time in 'the Bailor or owner. Hel 83. Leach 242. There is always a right to countermand.

If one sells a horse to another, and the latter on delivery, immediately rides away with him without vendors consent: - No Larceny. Whatever the original intent might be - Absolute non possⁿ in vendee. Leach 401. 2. Mc Nally 592. Vendor has parted with his right of possⁿ - It is only a fraud.

If A lets B a horse and B with intent to convert y^e rides away with him - not Larceny. 4 Col 230. 1. Col. 504. Here the original hiring, must be bona

fide. and the intent to steal, subsequent. Leach 358.
Secur in Larceny. Leach. 213. 358. ante.

The true reason in the first case seems to me to be, it is constructive possⁿ is not in Bailor. he having no right to countermand - no constructive possⁿ. 7. T.R. 9. Leach. 213. 358. 401. 2 Theobaldy 892.

Suppose that after a time for wh^y hiring was, has expired. y^e a thief converts "animo furandi" - Leach 358. & Quere.

When kata the Terms of the Bailment, Bailor has no right to countermand at y^e time of conversion. y^e conversion cannot be Larceny. in the delivery was obtained withⁱⁿ intent to steal. As house hired bona fide for a month. converted in a week. Leach 358. 2. Secus if Bailor according to terms &c. had a right to countermand - constructive possⁿ in last case. not in the first 3^d of bailment was obtained with intent to steal. 'tis always Larceny.

The bare non delivery of goods by the Bailee to Bailor. is not of course Crim of felonious intent even in those cases in wh^{ch} converting "animo furandi" is Larceny. for it may happen from various other cause. 4 Bl. 230.

At Law if a Servant run away with goods committed to his custody and possⁿ. not a Felonious Taking. mere civil wrong - breach of Trust. - Now. by St 21. Hen. 8th. it is Larceny. if y^e goods are of y^e value of 40. s. in apprentices and Servants.

under 18. 4 Bl 230. 1. Hal 504. 2 Bac 274. 1 Haw.
89. 138.

Quere why don't y first case come within y Lt.
yt of y waerbraken &c? (last b) Does Quere. as to
y Rule of C Law. Hasnt the Law undergone a
change in Modern times?

But at C Law. if the Servant hadnt the possⁿ
but merely the care and oversight &c. running
away with or embezzling, is a felonious taking
4 Bl. 231. 1. Hal 505. 6. 1. Haw. 136. Mor 246.
Poph. 84. As a Shepherd or Butcher possⁿ in the
Master. Hal 35²

If goods are stolen from the Thief, y second taker
is guilty of a felonious taking from y owner. for y
property and possⁿ in Law are in him 1. Haw. 136.
7. 2. Bac. 473. 2. McHally. 589

If one steals goods in y County of A. and carries
them into y County of B. he is guilty of felonious
taking in B. and may be there prosecuted.
For every moment's continuance of y offence of taking
is a repetition of it. 1 Haw 136. 7. Post 69. 2 Bac 473.
he may however be prosecuted in A. Secus. if
original taking in a foreign state. 1. Haw 137.
J. Paterson. 2. John R. 477. 79. Contr R. in Comt.
and Map. 1. Mass 116.

It is not larceny to receive goods, clandestinely from
y wife or the owner. Leach 49. Because her taking
is not felonious. She cannot be guilty as principal.
Ergo (no accessory).

"Carrying away" The least removal from a place is a carrying away. (tho' he afterwards leave ym. or is detected.) As leading a horse out of his close, he is apprehended. So carrying goods down stairs only. So taking goods out of a Trunk, and laying them on the floor.
 4 B.C. 231. 3 Ans. 108. 9. 1. Hawk 140. 2 Bent 215. 1 Hall 508. 2 B.C. 31. 2 Bac 474. Tort 108. 2 Mc Nally 592.

Placing a bale of goods, on its end, not a carrying away - not removal from the Spot, but removing from one end, to the other of a waggon - sufficient.
 1. Hawk 141. n. Leach 229. 1 B. 1784. Case of Diamonds Earing. Ibid Leach 297.

Felonious

The Taking and carrying away must be felonious, i.e. *animus furandi* (Hence those wanting understanding, are excused.) So are mere Trespassers. As a Servant privately takes his Master's horse, to ride and returning him. So taking ones Blough. & without Leave and using it, and returning. 4 B.C. 232. 1. Hall 509. Intent to be discovered by Jury. 4 B.C. 232.

Whenever one takes personal goods from a house of another vs his Will, y law presumes felonious intent, till y contrary appears. Leach 203.

"Personal goods of another" Things Real or savouring of the Realty, are not the subjects of Larceny Land cannot in its nature be taken, &c.

And corn, grapes, apples &c. growing or before Severance are not within the Law, as they adhere to y Tree hold. 4 B.C. 232. Leach 208. 2 Bac 470. 1 Bent 187. 1 Hawk 141. 1 Mod 89. 1. Hall 509. 512. (i.e. if they are severed and

carried away by one continued act. for then they never were as moveables. in the possⁿ of y owner. actual or constructive. Made Larceny in many cases by 4 Geo 2. 4 Bl. 233. 2 Bac 470. 1 Hawk 142.

Secur if several at one time and taken away at another. an severed by the Thief or y owner. or any person. Here, when taken, they are Personals in the owners possⁿ 4 Bl 233. 3 Ans 109. 1 Hale 570. 1 Hawk 141. 2 Bac 470. Went 187.

Taking wool from a living sheep, or milk from a cow. *animus furandi*, is Larceny. Leach 181. 2 McHally 593.

Reason. for the distinction between Personal Chattels, and things fixed to the Freehold, may be, y^t as y latter are not so easily taken and removed. - not liable to be stolen. Ergo. so severe laws not necessary as to ym. 1 Hawk 142. 4 Bl. 232. 3. 2 Bl 469. 470.

Different reason. generally not so valuable.

Taking charters of Land. cannot be Larceny. it is said. because they relate to the Realty, are muniments of the Freehold, and descend to y heir. 2 Bac 470. 3 Ans. 109. 1. Hale 66. 570. 4 Bl 234. Str 1137. Leach. 13. Yet Treason will lie for them.

The goods must be of some value, in themselves, and some one must have some property in them. Hence the taking of choses in action cannot at C Law be Larceny. - of no value intrinsically, but merely in relation to something else. viz the right of wh they are the Obj and this right is not property in possⁿ 4 Bl 234. 8. Co 33. 2. 1. Hawk 142. 2 Bac 470. 1 Hale 66. Con. 2 Bac. 470. because they might answer the purpose of money. at y Camp. Made Larceny.

by St. 2. Geo. 2. 2 Bac 470. 1 Hawk. 142. No St of Men
-kind here.

Taking animals fera natura and not tamed or
confined, cannot be Larceny, at C Law. tho of
intrinsic value. As Deer in a forest Fish in an
open river. Wild fowls in their natural state,

4 Bl. 235. 1st 366. 1. Cal 511. 3 2 Bac 471.
1 Hawk. 143. 4.

Secus if reclaimed or confined, and may serve
for food. As Deer in a park. Fish in a Pond.

4 Bl 235. 6. 1. Cal 511. 2. Bl 393.

But such animals fera natura as will not
serve for food, are generally of no value, in the
Law, on this subject. Ergo tho reclaimed or confined
taking them, cannot be Larceny, at C Law. As Foxes,
Monkeys Bears. Wolves &c. 1 Hawk 143. 2 Bac 471.

3 Ins 109 1. Cal 512. 2 Bl 393. 4 Bl 235.

Yet even in these cases a civil action will lie
for the taking. 4 Bl. 235.

Yet the taking of a hawk tamed, may be Larceny,
it is void at C Law, as well as by St. 37. Edw 3.

2 Bac 471. 1 Hawk. 143. 3 Ins. 109. There at C Law.

4 Bl 235.

But domestic animals, may be valuable, tho
not serving for food, as horses, mules, and therefore
are subjects of Larceny. So, those who do serve for
food, as neat Cattle, Sheep, Swine, Poultry,

4 Bl 236.

Some domestic animals not deemed valuable in the Law on this subject as Dogs. Cats. Eggs taking - not Larceny. at C Law. tho' it may be a Civil Trespass. 1 Bl 235. 2. Mod 293. 2 Bac 471. 1. Hawk. 143.

Under a certain Eng. Stat. excluding Clergy in certain cases. of "goods. wares merchandise" stolen money is holden. - not to fall within y description. Leach. 48. 56. 234. 403.

"Of Another" Goods of wh no one is the owner, at y time of Taking. not subjects of Larceny. as Treason Force. Muffs. Estrays. &c and before they are seized by the person having y right. 1. Hawk. 144. 1. Cal 512. 1. Bl 235.

Here at y time y property is in Dubio. or rather in no one. It may become the Kings. or in certain events. be re-vested in the former owner.

But this yre must be a property in some person, at y time, yet to said. the owner need not be known. & that Indictment lies for stealing the goods of a person. unknown. 4 Bl 235. 1. Hawk. 144. Dyer 99. 1. Cal 512.

But to said 2 Cal. 290. & Mod 249. That y Trial in y property is proved to be in a Stranger. it shall be presumed in the Prisoner. 2. Cal 290. 2 Mc Nally 580. Haw. 145. 1. Hawk. 145. n. Titus & B. 1785. 352.

Stealing the goods of a Parish church is Larceny. the goods of y Parsonages. 1. Hawk. 145. So stealing a Shroud from a Dead Body - it is y property of

of him, who was the owner, when it was put on.
1. Law. 145. 3 Ins. 110. 12. Co 113. Stealing and taking
up a dead body, no Larceny but an Indictable
offence, a high Misdemeanor 25 B 733.

A person may commit Larceny by taking
his own goods, in certain cases. As one delivers
goods to a carrier, Sailor, and afterwards, secretly
and fraudulently takes them away, with intent to
make the Bailee liable. 1. Law. 145. 3 Ins. 110.
Cro E. 530. So if he rob. his own Messenger, with
intent to charge the Hundred. 4 Bb. 231.

If A's goods are bailed to B. it seems that a
person stealing them, may be Indicted generally,
as for taking B's goods. 1. Law 145. 1 Br. 1785.
Kel 39

On an Indictment for Larceny, if a Felonious taking
is not found, & it cannot on a Special finding
give Judgment vs Def. for a trespass. Kel 29.
Leach 17. The 2 offences are generally different.

Punishment. Simple Larceny, an Grand or Petit,
is a C. Law Felony. 2 Bac 470. 1. Kel 69. 1. Law. 146.
4 Bb 90. 97. 2 Wils 13. 1. The Mally. 208.

Grand is a Capital Felony, at C. Law, but within
the benefit of Clergy, and however in many cases,
is taken away by St. as in horse Stealing. &c.
4 Bb 237. 8. 1. Kel 12. 3 Ins. 53. 2 Hawk. 489. (Money.

Petit Larceny with Forfeiture of goods and chattels.

and whipping or other corporal punishments. (1 Cow 146 3 Ins 218. 1 Hal 5. 330. 2 Bac 476.) not forfeiture of Lands. - not being a capital Felony.

Bl says. 4 Vol 237. That it is punished by imprisonment or Whipping at C Law. (yet he calls it a Felony. and says that it subjects to Forfeiture. + H 95. 7. Transportation for 7 yrs. by St 4 Geo. 4.

On Count no distinction between Grand and Petit Larceny. - Fine not exceeding 17. Sols. and if the value of goods amts to 3. £. 34. Whipped not exceeding 10. stripes - if of the value of 84. cents. or more. and under 3. 34. no Whipping - Treble damages to the owner. See St Count 413.

II. Mixed Larceny. This has all the properties of Simple. ergo the Rules laid down as to Simple will apply to this - but tis also accompanied with the aggravation of taking from one's house, or Person or both. 4 Bl 239.

I Larceny from the house. This the more aggravated than Simple. is not distinguished from it at C Law either in its general nature or punishment 1. Cow. 151. 4 Bl 239 240.

If indeed tis accompanied with a breaking of a house, in the night season, it differs most essentially, but it then falls under a different description - not Larceny. Burglary. ante. § 4. Bl 240.

But by St in Eng. & Penal consequences of Mixed Larceny differ from those of simple in general.

Benefit of Clergy being taken away from the former in almost all cases 4 Bl 240. Hawk. 157. 1 Hal 588.

Hel 31. Tort 78. Leach. 312.

On Count not distinguished at all from Simple Larceny.

2^d Larceny, from the Person. This is either by stealing privately or by open and violent assault, & latter offence is called Robbery. 4 Bl 241. 1. Hawk. 147.

The offence of privately stealing from the person, (as by pocket picking) is a Felony at C Law, and if of above the value of 12. p. capital, but clergyable at C Law. Clergy however is taken away by 8. Clr. 4. Bl 241. 1. Hawk. 150. 1. Hal 521. Leach 233. 2. Mc Naley. 599.

If of & value of 12. p. only, or under, not capital, at C Law. 4 Bl 241. Tort 73 2 Hal 360. 1. Hal. 157.

Difference then in punishment between Simple and privately stealing from the Person, is, that in the latter case, clergy is taken away, if above the value of 12. p. Aliter in the former.

Open and Violent Larceny from a person or Robbery, is the felonious and forcible taking from a person, of another's goods, or money of any value, by violence or putting him in fear. 4 Bl. 242. 1 Hawk. 147. 1 value immaterial.

"Taking from the Person" There must be actual taking - an attempt to rob, not felony, no at C Law. 1. Hawk. 147. 8. 1. Hal 532. 3 Dm 69. 4 Bl 242. This formerly holden to be so, 4 Bl 242. It is a high Misdemeanor incurring fine & Imprisonment. 1 Hawk. 148. 4 Bl 242.

Such attempt made Telling by T. Geo 2^d.
ransportation for 7 years. 1. Law. 148. 4 Bl 242.
Leach. 22. 257.

If one takes y goods of another, in his presence,
by violence, & putting in fear. (tho not literally
from his person) it is, within the definition) as
As first putting in fear, and then taking away
one's horse. - standing by him - or driving away his
cattle, wh one is in his presence. 1. Law. 148. 1. Hal
533. Gal 613. St 116. Carth 145. 4 Bl 242. 2 Mc Hale
594. 95.

So if having put me in fear, he takes goods
from any servant, and in my presence, tis a
forcible taking from my person. 1. Law. 148.

He who receives my money &c by my delivery
while I'm under terror from his assault, is guilty
of a forcible taking from my person. So if by
putting in fear, he extorts an oath from me,
that I will deliver it and I do it in persuasance
of the oath. 1. Law. 147. 3 Bro. 28. 2 Mc Hale 594.

But a taking wh is not either directly from
y owner, or in his presence, is not within y
definition. No Robbery, 4 Bl. 244. Combs B. 478.
St 118.

If several join to rob &c and missing him,
one of you goes from the rest and without their
knowledge and out of their sight, robs B.
and then returns to them. all are guilty.
because of a intent to rob, and to assist each
other. 1. Law. 148. 1. Hal 533, 34, 37. 2 Mc Hale, 596.
Quere if they collected for the purpose of robbing
any person... who might fall in their way.

Redelivery after the taking is complete. don't
purge the offence of taking - tis still robbery. 4 BB
242. 1 Clow. 147 3 Ans. 60. 69. for the definition
don't require a continuance of goods in the robbery.
pophⁿ. Leach 224. 1. Cal 533. 2 Mc Hally. 594. 5.

"By violence or putting in fear" The criterion
wh distinguishes robbery from other Larcenies.

Secus. there can be no robbery 4 BB. 242. 1 Clow. 148.
a 3 East 68. Kel 69. 70. 2 How 294

"Violence" in this case denotes more than is implied
in the mere act of taking, wh is violence, in Bridgms
of Law - as there is violence in Pocket Picking.
But Robbery requires more.

It denotes violence of some kind to the person.
but it ought to be such, as is calculated to
excite fear. Semble. 1. Clow 149. n. 4. BB 243. 1 How 128.

But actual violence not necessary. Putting in fear
sufficient. As case of oath extorted. Sub. 1 Clow
149. n. 1. 128. 9. Leach 203 4. 257

The violence or putting in fear must be previous.
at least must not be subsequent as If one steals
privately from the person. and post keeps it, by
putting in fear it is no Robbery 1. Clow 148. n.
2 Bole R. 154. 1. Cal 534. 5. Taking &c by violence.

The violence must be professedly for a purpose
of obtaining the money. &c taken So where several
finding one drunk. and under pretences of carrying
him home. drag him along. kick him. and
privately take his money. - No Robbery. 2 Mc Hally. 597.
1 Clow. 148. n. 1. 13 1784. 5. 72. And cuffing a
prisoner to extort money from him. and then

actually extorting it. is Robbery. Leach 260. 2 Mc Nally 597.

As to putting in Fear, satis that so much force or threatening, by word or Gesture, is used, as might naturally create an apprehension of danger. 4 Bl 243. 1 Law. 149m. Tort 128. Leach 204.

So, such threatening, as is likely according to common Experience, to excite an apprehension of danger to one's character or good name - satis putting in Fear. 1 Law 149m. No Threatning to accuse one of an unnatural crime. 1 B. 118. P. 296. 1786. p. 542. 2 Mc Nally 598. 9. By all the Judges of Eng. so holden. Tort 129. Leach 199. 257. Fear of personal violence not necessary.

Begging with a drawn sword, is satis for putting in fear. So forcibly extorting money from another under pretence of a Sale. 4 Bl 243. 1 Law. 149. 1 Leach 533. 4 Leach 204. 2 Mc Nally. 597.

Whether compelling a Market woman, or any haggler, by violence, - to sell his goods for the full value, is robbery. Sub. Tem. non. no felonious intent. 1 Law 149. 4 Bl. 243.

See Farns case Kel. 43. That taking goods under legal process, with colour of right and with intent to rob. is robbery in fraudem legis. Sed quere. Where is the Fear? or satis cause of fear.

"Putting in fear" not necessary in the Indictment. "By violence" sufficient. 4 Bl 243. 1 Law 149m. Kel 50. Leach. 204.

When the offence is laid to have been committed, "by putting in fear" not necessary to prove actual fear. Such circumstances of violence or such threats as are calculated and are likely to excite it sufficient. As one knocks another down without warning, and strikes him while senseless. Robbery tho tho no actual fear. 4 Bl. 243. 1 Hal 532. 1 Hawk. 149. Post 128. Leach 204.5. 2 McHaley 598.

A claim of property in the goods taken, without any colour of right, is no excuse. 1 Hal 409. 1 Hawk. 149. an openly taking goods from the Person, without violence, or putting in fear, is Felony of any kind. is doubtful. *Kata Hawk.* it is not. 1 Hawk 150. *vid* *Obid n.* at 149. n. as smacking a hat from ones head, and running away with it. Ray 270. 6 Dyer 224. It don't strictly fall under either of the divisions of Larceny from a Person. 2 Roll 154. *Heb.* 143. 43. 70. 1. *Id* 254. Leach 264.

An Indictment for robbery on the highway, is not supported by *Pro* of a robbery in a dwelling house. "Highways" in this case is part of a description of the offence. Leach. 53. 2 Hawk 495. 2 McHaley 599.

A capital Felony (whatever value of goods, but Clergiable at C Law. - Now ousted of Clergy by 20. 23. Hen. 8. and 3 & 4. Mills and Mans. Ergo Death in England, both in Principals and accessory before the Fact. 1 Hawk. 149. 50. n. 4 Bl 243.

NB There is some omission in the last rule, wh the reader's good sense must supply.

• Forgery

Forgery or the crimen Falsi at C Law. is the fraudulent making or altering of a writing to the prejudice of another's right. 2 Bl. 247. 1 Hawk. 330. 210. 12. 2. *Que* 580.

Records, other authentic writings of a Public nature, as Parish Registers, &c. Deeds and it seems, Wills are subjects of Forgery at C Law. 1 Hawk 338. 5. 2. Bac 368. 1. Roll 50. 5. 76. 3 Mod 66. Str 69. 1. Roll 68. Ray 81. 8. Mod. 760.

No decisions at C Law as to a will. But it is now Forgery at any rate. by 2. Geo. 2. 1 Hawk. 210.

But according to a great number of opinions, making or altering of any private writing of a nature inferior to Deeds, Wills &c. is not Forgery at C Law. as notes orders, Bills of Exchange, not Specialties, and according to some there is no punishment in the cases - not even for a Cheat. 1 Hawk 338. 1. Roll 66. Cro Eliz 853. 3 Bull. 265. et ibid.

But it has been holden since Hawkins time, that fraudulent making &c of any writing, by which another may be prejudiced is Forgery at C Law. 2 Ed Ray. 1461. Str 747. Bac 10. 2d Ray. 737. Fraudulent making & of a bill of Exchange on unsclamped paper is Forgery. 2 C R 666. 666. Case cited Leach. 246. 2 Mc Nally 480. 5. 2 Str. 906.

By a variety of Eng. Ls. almost every species of Writing is made the subject of Forgery. 4 Bl 247. 1 Hawk. 330. Count G. includes all writings. Str 184.

If one makes a False will in the name of another, it is Forgery is complete. tho' the supposed Testator is living. Leach 103. 391. 2 Mc Nally 483.

Not only actually making a false instrument and
 subscribing another's name, to it, or fraudulently
 altering one already made, is Forgery, but many
 other acts are so. 1. Hawk 336. As one employed to
 write a will for a sick person falsely inserts
 legacies not directed to be inserted. Here y name
 is not forged, nor is the writing altered, after being
 executed. 1. Hawk 336. 2 Bac 567. Mod 760.

So writing an obligation, release &c. over one's
 name, found at the bottom of a letter. &c. 1 Hawk,
 336. 3 Inst. 371. 2 Bac 567. Here y name is not
 forged, but the Instrument is.

So making a mark in y name of another, is Forgery.
 Leach 56.

So if one inserts in an Indictment y name of one,
 vs whom it was not found, y is an alteration.
 1 Hawk 336. 3 Mod 66. 2 Bac 567. 8 Mod 192. 12
 Mod 493. s.

Fraudulently altering a deed in a material
 part, is Forgery. 1. Hawk. 336. 2 Bac. 567. Mod 619.
 11. Co 27 a. As Manor of B. for Manor of A.
 £ 1000. for 100 £. 3 Inst. 169. Contra because not
 in the name of another y true signer, and
 neither hand nor seal counterfeited) But tis
 directly within the definition. Tenus if the part
 is immaterial.

If one having found a Bill of Exchange, alter
 or forges an Indorsement to get it discounted,
 it is Forgery. 1. Hawk. 210. n. 3 at C Law. 6. 2 La Raymo.
 246. a.

One may be guilty of Forgery by making a deed
 himself, in his own name. As one having ^{made} a deed
 of B to A. post grants the same to B.
 and antedates the deed. This is fraudulent and

and to the prejudice of A. 1. Hawk, 336. Mod 665.
759. May 101. 2 Bac 566. Dyer 288. Contr.

But he who honestly writes an Instrument, in
another's name, and signs and seals it for the
latter, in his presence, and by his direction is not
guilty of forgery. It is the act of the latter, in Law.
1 Hawk. 337.

But the making &c must be fraudulent. Ergo
if the obligee changes the words bonds into Pence
it is general Forgery - it is injurious to himself.

1 Hawk. 337. May 92. 2. The Mally. 636. But y security
is avoided by it. Ibid Ep. 224. 11 Co 26. 1. Root 941.

1 Hawk 337. Yet tis said even this alteration

if made with a view of gaining an advantage
to himself or to prejudice a 3^d person, wd be
forgery. 1 Hawk 337. 2 Bac. 567. As obligee

bound to assign his obligor to a Bona Fide
creditor of his own. makes the alteration to Def-
raud, the creditor by rendering y deed void.

Regularly a Non-Tearance cannot omit to
forgery. And y intent be fraudulent as omitting
a Legacy in a Will, forgery being positive.

But is said that if the omission of one beque-
mentally alter y simulation of another it may be
Forgery. As omitting an Estate for Life to one,
whereby the devise of an intended remainder to
another is made to take effect "in Present" for
here the omission operates in favour of the latter
as a positive devise for the life of y Former.
1 Hawk 337. Mod 76a. May 161.

It is not necessary pt one shd be actually
prejudiced 2 La Ray. 1401. 6. Tit. 34. Bards. 11.
La Ray 78. as where the obligation is never
enforced - Sufficient to infer a general intent

to defraud, without pointing out the particular mode, is with intent to defraud a b. Leach 76.

It is not necessary to Forgery that the writing should be published 2 Ed Ray 1261. 3. Str. 747.

It is punishable, tho the party keeps it in his own desk, y intent being clear. Forgery the name of a fictitious person, may be Forgery. Leach. 83. 182. 216.

Suppose an allegation in a part immaterial? If made by the obligee, it is regularly injurious to himself only. If by a stranger or obligor, of no effect. 11. Co 27. a. Yet if by obligee it might in some cases prejudice another. As another might have the beneficial Interest, tho it be a forgery if the intent was fraudulent. The least variance between the writing recited and that offered in Ev. is fatal. Leach 389. as a General Rule.

On a prosecution for Forgery, a writing "purporting" to be such, an instrument Def cannot be convicted, if it does not on its face purport to be y Instrument described. Doug. 287 312. 1 East. 182. m. Leach 209. Care to y effect of y words. "Tenor following" "as follows. That is to say" &c.

See Hawk. 146. 98. Cowp 229. 2d Ray 1575. Str 231. 7. 789. Sel 660. 3 Burns J 100. Doug 93. 183

On the Indictment the Forged Instrument must be set out in words and figures. 1 East 180. m. Doug 287. 302. Leach 209.

It is punished at C Law by Fine & imprisonment & pillory. By a variety of Eng Str. more severely punished - in most cases with death.

4 Bl 247. 50. Tost. 116. An the person, in whose

name y forged instrument is, may testify vs Prisoner, see
Pea Bri 95. 110. 1. Mc Nally 37. 60. 105. 17. 30. 9. 41. 4.

Perjury

Is the crime of "swearing wilfully absolutely and falsely" in a matter material to the issue in question under a lawful oath, administered in some Judicial proceeding. 4 Bl. 137. 3 Ins. 164. 1 Hawk 318. 3 Bac 814.

It must be a wilful and false swearing & with some degree of deliberation and this ought to appear clearly. - it is not perjury if thro' surprise - mistake or Inadvertency. 1 Hawk 319. 3 Bac 814. 5 Mod 350.

10 Ibid 195. Salk 131. 3 Burt 163. 4 Bl 137.

2 Mc Nally 635.

"The oath must be taken in some Judicial proceeding" i.e. in some Ct and before some officer having authority to administer an oath, and in some proceeding relative to a Civil Suit or criminal prosecution 1 Hawk 319. 4 Bl 137. Cro E. 168. or 188. Moy 128. 2 Roll 258. Tob. 62. 3 Bac. 184. 814.

Is immaterial any Ct is of record or not 2 Mc Nally 479. Leach 383. 2 Burr 1189. As Chancery or ecclesiastical in Eng. or any other Lawful Court. 1 Hawk 319. Cro E. 907. 185. 609. 5 Mod 348. 1 Roll 41. 2 Do 257. 12 Co 161. Cro J. 112. 12. 3 Bac 814 814.

Any voluntary or Extrajudicial oath is not within the Law. 4 Bl 137. 1 Hawk 320. As an oath before a Magistrate. on making a Bargain. y y honesty is y venaeis &c 1 vents. 369. 110. 2. Roll 257. Gels. 72. 3 Ins. 166.

But perjury may be assigned on an affidavit or deposition, And y affidavit &c is in no way used by the party taking it. 1. St. R. 315.

Perjury is confined to such public oaths as affirm or deny some matter of fact - not predicable of promissory oaths as oaths of office 1. Stark 320. 2. Role 257. 3. An. 166. 3. Bac 814. but the violation is a misdemeanor. As oath of a Juror or Judge. 1. Stark. 321. 4. Com. 147.

But perjury is predicable of any false oath material to y point in question in Judicial proceedings. This not affecting the principal judgment. As respecting the ability of one offered as Bail &c. so upon any interlocutory question. 1. Stark 322. 1. Role 40 3. Bac 815. 4. Com. 146. 7. #1 for ~~and~~ y following rules see next page.

If a def. in Chy having given a false statement explains it. Upon Exceptions taken & in his second answer. consistently with y truth of facts, he is not guilty, mistake presumed. 1. Sid 418. 2. Keb 576. 2. The Nalley 474.

But a Juror who violates his oath in his finding, is not guilty of Perjury. for he is not sworn to testify the truth. his oath is but promissory. *Ex parte*.

It is said not to be material, an the matter sworn to be true or not in fact. if y witness daunt know it to be true. he is perjured for he is to swear to those facts only wh are within his knowledge. 1. Stark 322. 2. Role 77. 3. An. 166. 3. Mod 222. 6. R. 639. 4. Com 147.

Suppose he swears absolutely to what is not true but believing it true. Guilty of Perjury? I think not.

(# A Party when allowed his ^{own} oath in Judicial proceedings may commit perjury as well as an Indifferent witness. 10 Def. in his answer in Chy. Bull 232. 2 The Mallet 476. Parties affidavit in Eng on Collateral points in courts of Law. 1 Hawk 322. 1 Role 40. 3 Bac 810. 4 Com 146.7)

The swearing must be absolute and direct, swearing under such qualifications, as "I think or believe" or according to my recollection cannot be perjury. 1 Hawk 32. 3 Inst 166. 3 Bac 810. 4 Com 147. Where if the witness does not think so. Comp 229 for it has the weight of common Testimony, may not Law be thus evaded. It is Perjury. Leach 301. 2 BB 888. 1 The Mallet 262. 3.

The swearing must be to a material point, Impertinent and idle testimony cannot be perjury. 1 Hawk 323. 4. 3 Bac 810. 1 Sed 274. 4 Com. 147. Rob 53. Tal 14. Cro E 502. 1 Role 78. 141. Id Ray. 258. 2 Mod 348. 45. Evid in daily experience. Question was an a was "compus Mentis" or not. The witness gives the history of a Journey to see A, and misrepresents some of the incidents of the Journey.

But if the False Evi. tho circumstantial and not directly applying to the Issue. Tends to aggravate or exonerate some damages. it may be perjury. 1 Hawk 323. Cro J. 212. 12. Co. 101. 2 Leon. 198. 3 Bac 810. It goes to one point in question. and is material to that point viz y point of damages.

So it is said if the immaterial and false part of a Evi is likely to induce a Jury to give a more ready credit to the substantial part 1 Hawk 323.

Ed Ray 208. J. Palm. 382. 2 Robt 308. This point however is not well settled. Hawk 324. As Taidely meaning a certain artificial or natural mark about stolen property - false professions of good will to a party to whom he swears &c.

Swearing that one beat another with his sword, when in truth it was his staff, it is not satis material to constitute perjury. Hawk 323. 4 Com. 147. The beating only is material. There may not the kind of instrument tend to aggravate &c.?

It need not appear in what degree, & falsed. Evi was material - satis if it be circumstantially so. much less necessary that the Evi be decisive of the Issue. Hawk 325. n. Ed Ray 208. 589. for it may be very material and yet not satis to govern the finders.

It is always incumbent on the Prosecutor to prove the Evi material. Hawk. 325. n. Cites. 6 B. 1784. b. 5.

The Porter of a former Issue is good Evi. if a trial was had so as to introduce Evi of what was sworn. 2. Mc Nally 468. 635.

And the cause in wh perjury was committed must be set forth. 1. Mc Nally 283. Ray 170.

It is not necessary that the false Evi shd have been created by the Jury, nor of course that any person shd have been actually injured. & crime don't consist in a damage done to an individual but in abusing public Justice. Hawk 325. 2 Leon. 211. 3 Bbid 230. 3 Bac 815.

The words "Wilful" &c. are necessary in the Indictment at C Law. Secus under Count &c.

Sent. Str. Count 339. "Falsely, maliciously" satis.
Leach. 691.

To convict of perjury, 2 witnesses at least are
necessary. Secus there wd be but one oath vs
oath. 2 Hawk. 325. n. 10. Mod. 195. v B. 1784. 6812.
1. Mc Nally 37. 2 do. 635.

How far circumstantial Evi of a fact of a
Def^t having given Evi, is good. Quere 2 Mc Hale
47. 4. Holden in Eng. that a person injured
by the injury can't testify vs the offender, on
public prosecution. 1 Hawk 325. 2d Ray 396.
Lanchild vs Beach. Ct of Errs. 1804. Str 1043.
1104. 1229. 1. 1 R 298. 1 Vent 49. 35 R 97. 308.
7. do 60. 4 do 20. 589. 4 Burr. 225. decisions
contradictory-

"Interest in the question" Pea Evi 95. 116. 1 Mc
Nally 60. 105. 17. 38. 9. 41. 4. It seems he is now
competent. Pea Evi. 146. 8. n. 4 East 581.

Two persons cannot be joined in a prosecution
for Perjury if offence not being the same 623. 570. 921.
4 Burr. 2462. Baradai 25. Cowp 494. (Bill n. P. J.
3 R 98. Secus of Subornation infra. 2d Ray 886.

Subornation of Perjury is the offence of procuring
another to commit perjury. But a perjury must
be actually committed. Secus no Subornation
1. Hawk 325. 4 R 137. 8. 1 Roll 41. 5. 72. 1 Feb. 72.
3 mod 122. Cro J 58. 2 Mc Nally 637.

Perjury and subornation of Perjury is punished
at C Law. formerly, anciently with Death. afterwards,
banishment or cutting out a tongue. Then forfeiture
of goods. Now. Fine. Imprisonment and inability

to give Evidence + 138 138. 3 Inst 103. Other Penalties superadded by Stat. 5 Eliz and 2 Geo. 2^d.

Inciting one to commit perjury, it not being actually committed, is punished at C Law. by fine and Infamous corporal punishment.
1 Hawk. 325. 6. It is a Misdemeanor.

It is a consequence of a conviction of Perjury at C Law. that the offender can never be a Juror.
1 Mc Hally. 229. 3 186. 363.

A variance in the Indictment by omission or addition of a letter, is not material, in it make another word, as understood for understood" Secus if it does as air for hair.
Cowp 229. 1 YR. 237. Sel 660. 2 Hawk 239. Doug. 184. n. 784. Leach 137. 140. when signed on an Affidavit. 2 Mc Hally 571. 13.

Under the Count Law. perjury and subornation of perjury, are punished by Forfeiture of £67. Imprisonment in New Gate. 6. mth^t if a Male. In a common workhouse or Goal if a Female. Disqualified to take an oath in any Ct of Record and in case of inability to pay the Forfeiture, is set in the Pillory one hour, with both ears nailed. Count St. 339. 40. 8. 186. affirmation of Quakers. punishable like a false oath.
St. 339.

For the criminal Jurisdiction of Count Ct and the practice therein see Count St. 127. 9. 30.
183. 6. 361. 413. 14. 336. 7. 142. 285. 370. 158. 1 Swift 101.
96. Selb. 269.

Of Bail in Criminal Cases.

Where one is arrested for a crime and brought before a Magistrate (on charge of a crime not cognizable by him,) y^e latter is to enquire into y^e facts charged, to discover an he ought to be holden to trial or not. 4 Rob 296.

But he has no right to examine the prisoner at C^o Law. In Eng. tis authorized by St 2 and 3. Ph. Mary. 4 Rob 287 96. 2 In. 390.

If on enquiry it appears clearly y^t y^e offence charged has not been committed or y^t y^e charge vs y^e prisoner is wholly groundless, he is to be discharged 4 Rob. 296. 2 In. 389.

Secus he must be committed to prison to be kept for Trial, or if the offence is bailable give bail for his appearance i^e. furnish security for his appearance. 4 Rob 296. St Comm 142. 2 Swift 390.

Bailing is the delivering one to his Sureties, on the giving Security.

First. regularly for all offences below Telling Com by C^o Law or St. y^e offender ought to be bailed. 4 Rob 287 & 1 Hal 127. n^o it be prohibited by St.

Second. At C^o Law. (according to Rob^t) all felonies were bailable, even Treason or Murder, according to other all offences. n^o homicide) is y^t y^e accused was admitted to Bail in almost every case. 4 Rob 298. 2 Inst 182. 2 Com. 468. 1 Hal 97. 1 Bac 220.

3^d. But the St Westm 1. 3 Edw. 1st denies bail in Treason. and many felonies and further provision

are made on the subject by 23 Hen. 6. 2 Phil. Mar. 4 Bl 298.

As in any case of Felony where y party has confessed or is notoriously guilty. So in Arson, Murder &c accused not now bailable in England.

But the Eng Act taking away y power of bailing in certain cases, don't extend to B.R. in England. This Ct or any one of the Judges of it in vacation may now bail for any crime, even Murder or Treason. 12 Rob. 90. 4 Bl 299. 1 Bac 219. 223. 2 Inst 189. Sal 145. Str 911. 7242. 2 Hawk 175. 6 Corp. 333. 4 Burn. 2179.

But the Ct of B.R. will not admit to Bail in those cases in wh bail is prohibited by St. in under Special Circumstances in y party's favour, as where the Prosecutor has unreasonably delayed, y Trial, where the Evi appears very weak, - where y prisoner's life is in danger from confinement. See Leach 122. 2 Hawk 175. 5 Mod. 454. Rob 15. But in case of illness it must arise from confinement. 1 Bac 223. 4 Camp. 233.

In prosecutions for offences amounting to Misdemeanors at C.Law. - Def may appear by Atty. 1 Mc Nally 59. 4 Rob. 375.

After verdict as the Def he ant admitted to Bail in prosecutor consents. 1 East 159. This rule has often been dispensed with in Court. 1 Mc Nally. 59.

For Court Law on this subject: see 1st Court. 22. 420. It is a General Rule that he who is Judge of the offence, may bail the accused. Ex officio at C.Law. 2 H Bl 420. 2 Hawk 93.

By y Com Law. if a magistrate takes insufficient bail and y Principal don't appear. y Magistrate is finable 2. Pol 297. 1 Bac 227. 2 Hawk 142.

In Eng four sureties are required generally in case of Felony. - 2 for inferior offences. 2 Hawk 141. n. 1 Com. 473. 2 Hal 125. 10 Co. 101.

Refusing bail where it ought to be granted is a misdemeanor in the King's Bench at C Law and as such is punishable by fine or amercement. The party injured has also his action. 1 Com 473. 2 Hawk 143. 1 Bac 228. 16 Mod 179.

Granting bail when not grantable is punishable at C Law as a negligent Escape. by fine - It is also punishable by several Eng Ks. 2 Hawk. 142. 206. 1 Seal 506. 1 Com. 473. 4 Inst 479. 179.

It has been decided in Court. on a prosecution for Felony. (the Def being out on Bail) yt y verdict can't be received. ni he is present in Court. 1 Root 90. There has not the practice been often different. 1. Mc Kaley 59. 4 Pol 373. 1 Bac 185. Is his presence necessary ni on Indictment for Felony?

If a prisoner prosecuted for a given offence is acquitted but proved on the Trial to be guilty of another y Ct may detain him. to be prosecuted for the latter. Leach 355. 355.

For Costs in criminal cases in Court. see Court St. 143. 4. 792.

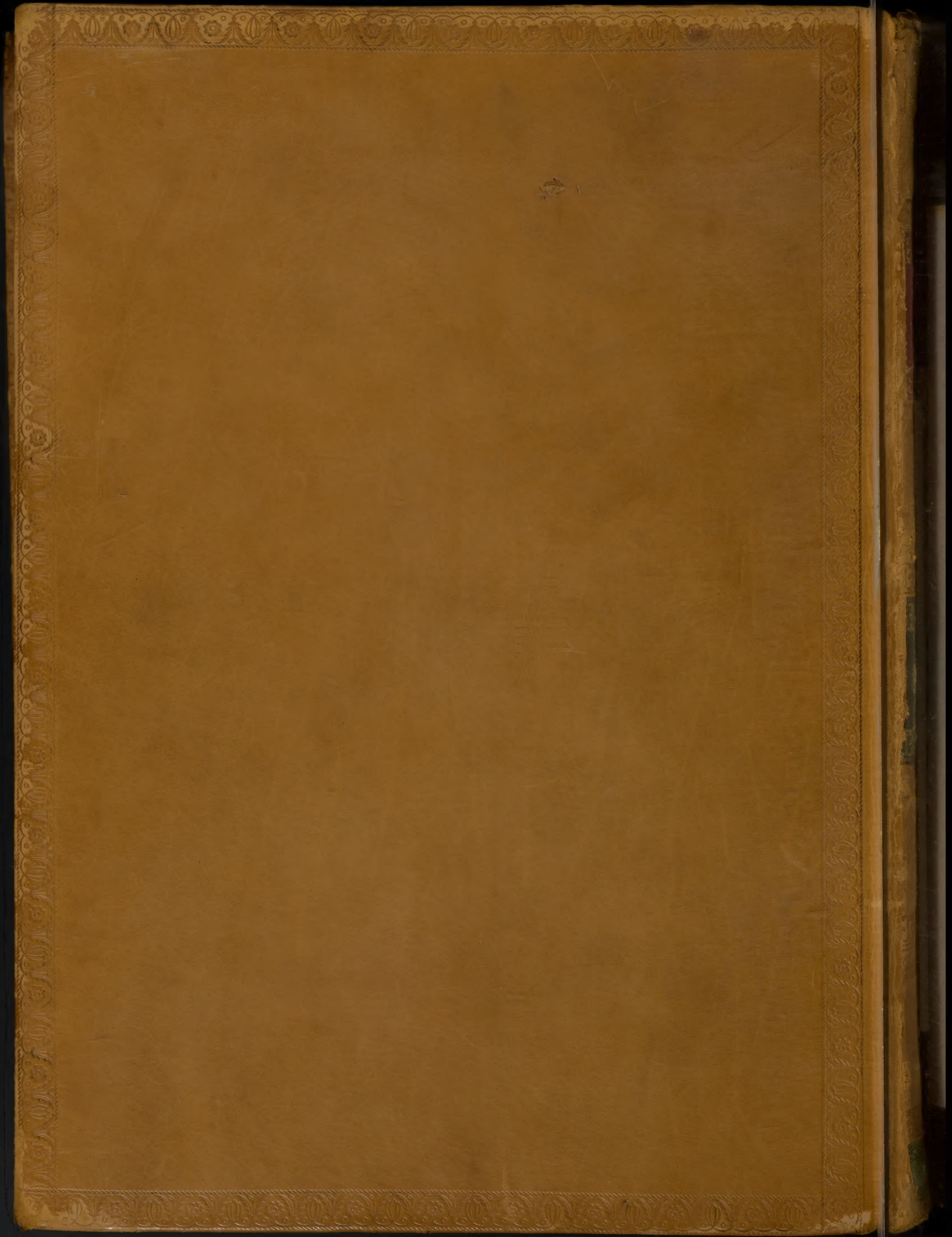
535.

In Eng no costs are paid on either side when
y crown prosecutes. ni in particular cases by
Special provision of the Legislature.
7 J.R. 367. Holt 21. 125.

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